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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965

No. [redacted] 165

ROLLAND B. McMASTER,
Petitioner,

v.

UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit.**

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UNITED STATES OF AMERICA.

## PETITION FOR WRIT OF CERTIORARI

**To the United States Court of Appeals for the Sixth Circuit.**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on March 25, 1965.

## OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra) is not yet reported.

## JURISDICTION.

The judgment of the Court of Appeals was entered on March 25, 1965. A timely petition for rehearing was overruled on April 21, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED.

1. Whether, where the Court erroneously admitted a statement of a co-defendant to an F. B. I. Agent as to petitioner, without any limiting instruction at the time it was admitted, such evidence was prejudicial as to petitioner.

2. Whether the case should be remanded to the Sixth Circuit to consider many issues which were raised there in good faith, because the Court below did not adequately consider them.

## STATUTES INVOLVED.

29 U. S. C. 186 provided at the relevant time in pertinent part:

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in any industry affecting

commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or thing of value.

(c) The provisions of this section shall not be applicable * * * (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business * * *."

## STATEMENT.

The indictment charged petitioner, a Detroit Teamster labor union officer, in thirty-two counts with receiving a total of $8,823.28 in 32 payments from one William F. Wolff, Sr., President of Youngstown Cartage Co., an employer, in violation of 29 U. S. C. 186 (b). The indictment also charged Wolff with making said payments. It further alleged that petitioner received said payments through Ram Transport, Inc., which petitioner was alleged to own. Wolff was directly charged with causing Youngstown to make said payments to petitioner, not through Ram Transport, Inc. (App. 5a-34a).

Petitioner's pretrial motions to dismiss (App. 37a) and for a Bill of Particulars (App. 35a), were overruled (App. 39a, 40a). The motion for particulars requested, *inter alia*, the manner in which petitioner received and accepted such payments through Ram Transport, Inc.

During the pertinent period, September 1956 through July 1959, defendant Wolff was President of Youngstown Cartage Company, a trucking company, which had a terminal in Detroit. Youngstown made the alleged 36 payments to Ram Transport, Inc. by means of 36 checks (Ex. 18). Each check was endorsed by petitioner's then wife, Mrs. Yvonne McMaster,[1] and bears the stamp of the De-

[1] They were later divorced, and she was deceased at trial time.

troit Bank and Trust Company, where the money was deposited in a Ram account. There was no evidence as to how they reached Mrs. McMaster or Ram.

Reed Transportation Company, a predecessor of Ram Transport, Inc., was organized in 1951 as a 50-50 partnership of petitioner and one Reed, a disabled veteran and truck driver, as a trucking business (App. 82a-93a, 1430a-1432a). It was later incorporated and assumed the name of Ram Transport, Inc., each owning 50% of the stock (App. 84a-85a, 1430a-1436a, Ex. 41).

In 1954, Reed sold, with the help of petitioner, his interest to one Powers, who became President. Two years later, Reed sued Powers because he had not paid most of the purchase price, and threatened to sue petitioner. Petitioner paid the remainder of the purchase price. General releases were executed by all parties, and the certificate, endorsed by Reed to petitioner, with Powers retaining an interest, was mailed to petitioner by Reed's attorney (App. 89a-90a, 1437a-1443a, 539a-541a).[2]

One Rosen testified that he prepared the annual reports and tax returns from information and documents furnished him by Yvonne McMaster (App. 398a, 402a, 413a, 414a, 418a, 423a), which she filed (App. 400a, 402a, 403a, 411a, 413a). Over petitioner's objection, there were admitted into evidence without authentication or connection with petitioner what purported to be Ram's Corporate Book, Ram's Michigan Annual Reports for the years 1954-1958 and Ram's tax returns for years 1954-1957 (App. 56a, 59a, 64a, 399a, 401a, 403a-410a, 423a, Exs. 1-7, 13). The exhibits indicated that petitioner owned part or all of Ram,

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[2] Petitioner testified that about the same time, March 1956, his marriage with Yvonne McMaster was on the verge of breakup (they were divorced in 1961), and he had moved into a hotel. At this time, he gave Ram Transport Company to his wife, who was a business woman, which she and Powers thereafter operated (App. 1440a-1460a, 1632a-1952a).

or was an officer thereof. His purported signatures thereon, however, were not really his (App. 1455a, 1621a).

Between July 18, 1956 and May 30, 1960, various checks were issued by Yvonne McMaster, payable to herself, on Ram's account, which she deposited in a joint account with petitioner (App. 1234a-1239a). Of this money, she employed more than $28,000.00 in her personal business ventures (App. 1779a). Some was loaned to or used by petitioner (App. 1241a, 1472a, 1485a-1487a).

Petitioner's offer of proof that Yvonne McMaster had claimed that Ram belonged to her in connection with her personal business dealings was denied by the court (App. 1648a, 1657a, 1658a, 1740a).

In 1961, defendant Wolff made three statements to an F. B. I. Agent (App. 103a-104a). At first, he stated that the payments were rent for a tractor truck for use at the Youngstown's Detroit Terminal, pursuant to an oral agreement with petitioner (App. 104a-106a). Later he stated that he rented the truck on the recommendation of the terminal manager and pursuant to a telephone conversation with some unknown person at Ram, that the rental was about $3.00 per hour, that he did not know the make and model of the tractor, but that Ram was to furnish the upkeep, license and insurance (App. 106a-1011a).

At the third interview, he repudiated his prior statements, saying that he had never had any business dealings with petitioner (App. 141a).

These statements were admitted over petitioner's objection (App. 105a, 106a), and without a limiting instruction at the time admitted.

In his closing argument, Government counsel argued over objection and without proof, that members of the union were "frightened to death to testify" (App. 2009a-2010a).

The Government claimed that the payments did not fall within the exception in 29 U. S. C. 186, for bona fide transaction entered into at prevailing market rates (App. 48a-54a, 1832a).

As noted, it was the position of petitioner that Ram Transport was solely owned by his wife, Yvonne, during the period of the indictment; that he knew of no transaction between Wolff and Ram; and that he did not enter into an agreement with Wolff (App. 1420a-1421a).

Co-defendant Wolff, though not testifying, took the position that he did make payments to Ram, but that they were bona fide at prevailing market prices, representing the rental of a tractor, thereby bringing him within the exception to 29 U. S. C. 186 (App. 1849a).

The jury returned a verdict of guilty against both defendants on all counts (App. 2041a). Petitioner received a sentence of one year's imprisonment on each of Counts I and III through XXXII, to run concurrently with each other and a $10,000.00 fine. On Count II he received a sentence of six months to run consecutively to the sentence imposed on the other counts (App. 2077a).

The Court below summarily overruled all issues raised, save one. It ruled that the admission of defendant Wolff's statement to the F. B. I. Agent as to petitioner and the failure of the court to give a limiting instruction at the time they were admitted, was error. But it held that the error was harmless because the proof of petitioner's guilt was "overwhelming." See opinion, *infra*.

## REASONS FOR GRANTING THE WRIT.

1. Without question, the most damaging and direct evidence in the case was defendant Wolff's statement that the payments were made to Ram pursuant to an oral agree-

ment with petitioner, in view of petitioner's defense that he did not know about them. Aside from Wolff's statement there was no direct evidence that petitioner knew of the payments. The Government's case as to knowledge of the payments by petitioner was entirely circumstantial. Indeed, we argued in good faith below that the evidence was insufficient to support a jury verdict on the issue as to whether petitioner knew that payments were made by Youngstown to Ram, citing **United States v. Dunn**, 299 F. 2d 548, 555 (6th Cir.); **United States v. Berkeley**, 288 F. 2d 713, 717 (6th Cir.); **Brumbelow v. United States**, 323 F. 2d 703, 705 (10th Cir.); **Panci v. United States**, 256 F. 2d 308 (5th Cir.). The Court below, in ruling the evidence sufficient, did not directly meet our contention that there was no evidence of knowledge, but none of the facts related by the court below directly show knowledge. The admission of this evidence was, we respectfully submit, clearly prejudicial. **Krulewitch v. United States**, 336 U. S. 440; cf. **Spano v. New York**, 360 U. S. 315. This is so even if the proof indeed had been overwhelming, but it certainly was not on this issue.

2. In the court below petitioner made many contentions which were summarily disposed of by the court below with little, if any, discussion. We have already noted one as to the sufficiency of the proof as to petitioner's knowledge. In addition claims were made as to whether the evidence brought the case into the exception in the statute, as to whether the inconsistent positions of the defendants prevented a fair trial, as to Government counsel's closing argument, as to the admission of documents not properly authenticated or connected with petitioner, as to venue, and as to instructions. These issues were again called to the Court's attention in the motion for a rehearing. We respectfully submit that the court below should be required to adequately deal with these contentions. Cf. **Michaels v. United States**, 376 U. S. 356.

## CONCLUSION.

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX.

Nos. 15828-29.

United States Court of Appeals
For the Sixth Circuit.

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United States of America,
Plaintiff-Appellee,
v.
Rolland B. McMaster,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,
v.
William F. Wolff, Sr.,
Defendant-Appellant.

Appeal from the District Court for the Eastern District of Michigan, Southern Division.

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Decided March 25, 1965.

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Before: Weick, Chief Judge, Miller and Edwards, Circuit Judges.

Edwards, Circuit Judge. These appeals are from the convictions of a trucking company president (Wolff) and a Teamster Union official (McMaster) for violation of 29 U. S. C., § 186.[1] This statute prohibits payment of

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[1] § 186. *Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds*

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing

money or "other thing of value" by an employer to, and acceptance of same by a representative of his employees, except in certain instances, including the sale of "goods or commodities for fair market value."

There were 32 counts in each indictment against each defendant alleging payment and acceptance of 32 separate sums, totaling $8,823.48, between September 12, 1956 and July 17, 1959. The Wolff indictment alleged that he caused the Youngstown Cartage Company, of which he was president, to make the payments to McMaster. The McMaster indictment alleged that he received the payments through Ram Transport, Inc. During the critical period McMaster was an official of Local 299—a Detroit local of the Teamsters Union—some of whose members were employed by Youngstown Cartage. Prosecution evidence tended to establish that at the same time McMaster was president and controlling stockholder of Ram Transport, Inc.

Both men were tried jointly before a jury in the United States District Court for the Eastern District of Michigan, Southern Division. No motion for severance was made; but at trial the two defendants took different positions. Wolff, through his counsel, relied primarily upon the exception contained in Sec. 186 alleging that the disputed payments were "fair market value" for the rental by Youngstown of a truck owned by Ram. McMaster relied

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of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business. . . ." 29 U. S. C., § 186. (The statute as noted above was applicable during the period covered by these indictments. It has since been amended. See Title 29, U. S. C. A., § 186, 1964 Cumulative Annual Pocket Part.)

primarily upon denial that he knew anything about such payments, since he claimed he had given Ram Transport, Inc., to his wife prior to the dates of the payments.

Both of these arguments are reiterated before us on this appeal. A review of this lengthy record convinces us (as it did the jury) that evidence produced by the prosecution established that Ram Transport, Inc., was owned by McMaster during the period in question; that payment to it was payment to him for purposes of 29 U. S. C., § 186; and that this was not a bona fide exchange of goods or services "for fair market value."

Most of the facts essential to the view just stated are actually undisputed in this record.

The facts establishing the 32 payments totaling $8,823.48 by Youngstown to Ram Transport, Inc., on the dates in question are undisputed.

The facts establishing the deposit (and collection) of these 32 checks in the Detroit Bank & Trust Company account of Ram Transport, Inc., are undisputed.

The fact that defendant Wolff was president and controlling stockholder of Youngstown Cartage Company during the period of these payments is undisputed.

The fact that defendant McMaster was business agent of Local 299 is undisputed, as is the fact that some of Youngstown's employees were members of Local 299.

The fact that defendant Wolff caused these payments to be made by Youngstown to Ram is undisputed.

The fact that Wolff himself personally drew a majority of the checks in question is undisputed.

The fact that defendant Wolff and defendant McMaster knew each other, met socially, and were involved in other substantial business ventures together is undisputed.

The fact that prior to the period of these payments defendant McMaster was controlling stockholder of record of Ram is undisputed. (McMaster owned 132 shares; Edward J. Powers owned 5 shares.)

The fact that during the period of these payments the corporate records remained unchanged in this regard is undisputed.

The fact that defendant McMaster had access to substantial sums of money from Ram during the period of these payments is undisputed.

And, finally, the fact that during all of the period in question McMaster was frequently involved both in Detroit and in Chicago in representing Youngstown's employees as a Teamster business agent in direct negotiations with Wolff is also undisputed.

Two factual disputes are advanced—one by each defendant.

Wolff claims the payments were for rental of a truck owned by Ram for use by Youngstown's division in Detroit. The prosecution undertook the burden of proving the negative of this defense. In so doing they called all of Youngstown's terminal supervisors in Detroit, six office employees from the Youngstown office, and twenty of their Detroit truck drivers. The evidence is too lengthy and repetitive to summarize, but we have read it in full and conclude that the overwhelming weight of the evidence indicates that there was no such Ram-owned truck employed by Youngstown at the Detroit terminal during the period in question.

Against the evidence defendant Wolff's witnesses did not identify the make, the weight, the license, or a specific date of use or a specific load carried. The jury plainly concluded, as they had a clear right to do, that there was no such truck.

McMaster claims that, without any record being made thereof, he gave ownership of Ram Transport, Inc., to his wife prior to these payments; that he was estranged from her during the period of the payments, and that he had no knowledge of them. These assertions appear to us to be largely unsupported and obviously they proved unpersuasive to the jury. McMaster's credibility was continually challenged on these and many other points during his testimony at trial. Plainly, the jury disbelieved him. A careful reading of McMaster's own testimony convinces us that the jury had a clear right to reach this conclusion.

McMaster relied primarily upon the facts that during the period in question his wife kept the books of Ram Transport, Inc., and signed all the checks on the Ram Transport account in the Detroit Bank & Trust Company, and that his was not an authorized signature as to the Ram Transport account during this period. He claimed that he and his wife had been separated in May of 1956 and that at that time he gave her Ram Transport, Inc., as to which he had acquired 100% of the stock in his own name on February 17, 1956.

No legal record of any such division of marital assets was ever made until a property settlement between McMaster and his wife Yvonne was signed December 19, 1960, prior to a decree of divorce between the parties, dated February 27, 1961.

During all the period in question it is undisputed that defendant McMaster and Yvonne McMaster maintained a joint savings account and a joint checking account at the Detroit Bank & Trust Company. McMaster admits that joint income tax returns were filed by him and his wife Yvonne for the years 1956 and 1957. The statutorily required Corporation and Securities Commission reports made to the state of Michigan by Ram Transport, Inc., which defendant McMaster claims were prepared and signed by his wife Yvonne without his knowledge, showed

defendant Rolland McMaster as president and 100% stockholder of Ram Transport, Inc., during the years 1956, 1957 and 1958.[2]

Defendant McMaster contends that the division of property in 1956 between him and his wife Yvonne included her exclusive ownership of Ram and his exclusive ownership of another trucking company called M & G Trucking Company. But it appears that Yvonne McMaster was authorized to sign checks on the M & G Trucking Company account during all of this period and that he wasn't —exactly the same situation as prevailed in relation to Ram.

Yvonne McMaster did not testify in this trial. She had died May 26, 1961.

It may be pertinent to quote McMaster's own testimony as to his relationship with her during the period covered by this indictment.

"Q. (By Mr. Noonan) Now, if the decree was dated February 27, 1961, how can you account for the fact that this division of property you just referred to took place in 1956, five years earlier?

. . .

"A. As I said about five minutes ago, I kept the M & G Trucking Company; she kept Ram Transport, and we had made an agreement. That is what it was. Nobody was—this wasn't one of those things where everybody is mad. We were still friends. After this was over, she also kept the books for my farm and she—we weren't mad at each other as far as not speaking to each other.

"Q. Did you continue to be associated in business with her?

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[2] We believe the District Judge was correct in admitting these exhibits. 28 U. S. C., §§ 1732-1733. See also Rule 44, Fed. R. Civ. P.

"A. Well, in this respect, I helped her every way I could help her, and Mr. Powers also, and kept right on.

"Q. Did she during this period or subsequent to the early part of 1956—May, I believe you said—did she keep the books for M & G Truck Company?

"A. M & G, she kept the books for them also, yes. She kept them for the farm and M & G Trucking.

"Q. Now, after this separation in 1956, Mr. McMaster, what further connection did you have with Ram Transport?

"A. Well, the only connection I had with Ram Transport after that was any way that I could help either he or she, I helped them. That is the only connection I had with the outfit."

This last observation by McMaster does not, however, appear to be entirely accurate.

The facts show substantial access to Ram funds on the part of Rolland McMaster personally during all of this period.

1) It is undisputed that on August 31, 1957, a credit of $1,500 to Rolland McMaster was entered on the Ram books to wipe out a loan previously owed by McMaster to Ram.

2) McMaster admits that a Ram check, dated July 18, 1958, for $3,000 was used by him for an investment in an Oakland County land deal. It is not claimed that this was ever repaid.

3) McMaster admits that a Ram check, dated February 15, 1960, for $3,000 was paid to the Idle Acres Farm account as to which he claimed sole ownership. This check was marked "Loan" on the Ram books, but apparently has not been repaid.

4) McMaster admits that a Ram check, dated May 12, 1959, for $12,503.50 was used by him for an investment

in a Florida land deal.[3] It appears that this amount was repaid to Ram on August 14, 1959.

5) McMaster admits that a 32-foot Chris Craft boat was purchased for him out of Ram funds in May of 1956, the purchase price being $9,000. It appears that the down payment was made on this boat by a Ram check, dated May 23, 1956, in the amount of $1,000.

And McMaster admits that the other payments on the boat were likewise made by Ram, as well as payment of expenses for the operation of the boat. It also appears that when the boat was sold, although McMaster is positive in asserting his personal ownership, the funds derived from the sale were redeposited in the Ram account.

6) It is also undisputed that Ram checks totaling $9,950 were deposited in the joint account maintained by McMaster and Yvonne McMaster during the period July 18, 1958 to May 23, 1960. McMaster's testimony in this regard is that though he had the right to write checks on this account, he never did, and that these funds were used by Yvonne for her separate business ventures and expenses.

McMaster, as indicated above, did indeed separate from Yvonne McMaster and a decree of divorce was ultimately entered between them in February of 1961.

Subsequent thereto McMaster was married again to an Elaine Mastaw. Cross-examination revealed that prior to his marriage to the present Mrs. McMaster, and during the period of 1956-1959, McMaster had also "helped" Elaine Mastaw establish a truck leasing company and that she and her brother had been involved in Youngstown Trucking Company's purchase of a site for a new terminal in Detroit. As McMaster put it: "I think she [Elaine Mas-

[3] On the occasion of this payment it is interesting to note that appellee's Exhibit 55 shows a Ram bank balance of $12,736.60 before deduction of the check for $12,503.50, and a balance of $233.10 thereafter.

taw] and he [Miss Mastaw's brother] helped him [defendant Wolff] find a piece of land to put his trucks on and was involved in a house on the land."

The basic purpose of the statute under which these defendants were convicted is to prevent corruption in labor-management relationships affecting interstate commerce. The statute plainly does not require proof of the *quid pro quo*.

The Supreme Court has set forth this interpretation of the purposes of the statute:

> "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative.
>
> "The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds, and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization. . . .' H. R. 3020, 80th Cong., 1st Sess., § 8 (a) (2). The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the union representative is shaking down the employer. . . .' 93 Cong. Rec. 4746. The resulting Senate amendment made it criminal both for the employer and the 'representative' of employees to engage in such practices." **United States v. Ryan**, 350 U. S. 305-06 (1956).

We feel that there is ample evidence from which the jury could have found that each of these defendants was guilty beyond a reasonable doubt.

While under the situation just referred to above we do not reverse on factual grounds, for purposes of issues to be dealt with subsequently, we also note that on this

lengthy record the evidence establishing willful violation of Sec. 186 by these defendants was not merely ample, it was, in our judgment, overwhelming.

Both appellants also attack the indictments as constitutionally vague and contend that venue was not established in the United States District Court for the Eastern District of Michigan, Southern Division.

We believe the indictments were sufficiently clear and specific to meet all constitutional requirements. Defendant Wolff specifically complains that he was charged with paying money to McMaster and that his indictment did not allege the conduit (Ram Transport, Inc.) through which the payments were claimed to have been made. We find no necessity under modern rules of pleading of alleging each step of payments in the indictment. **Korholz v. United States of America,** 269 F. 2d 897, 901 (C. A. 10, 1959). Rule 7 (a), Federal Rules of Criminal Procedure.

Further, in the McMaster indictment (drawn and filed at the same time) this conduit for payment was spelled out. Defendant Wolff did not move for a bill of particulars prior to trial.

We think that defendants were adequately informed of "the nature and cause of the accusation." **United States v. Dickerson,** 337 F. 2d 343 (C. A. 6, 1964).

As to venue, we believe that deposit of the Youngstown checks in the Ram Transport bank account in Detroit (and collection thereon) was sufficient to represent payment of money in the Eastern District of Michigan.

Further, no objection having been made to venue prior to verdict, objection thereto was waived. **Cagnina v. United States,** 223 F. 2d 149 (C. A. 5, 1955); **Thomas v. United States,** 267 F. 2d 1 (C. A. 5, 1959).

The only substantial claim of error we have found in our review of these briefs and records is that of McMaster

pertaining to the admission of an FBI agent's testimony concerning statements made to him by Wolff as set out below:

"Q. (By Mr. Merrill) With respect, first of all, to June when you talked to him in June, did you discuss with him on that occasion the payments from Youngstown Cartage to Ram Transport?

"A. Yes, I did.

"Q. Did he indicate to you whether or not such payments had been made?

"A. He did.

"Q. Did he indicate as to any reason for the making of these payments?

"A. Yes, he did.

"Q. What did he say with respect to that, in June of 1961?

"A. Mr. Wolff at that time said that these payments were for rental of a tractor type truck for use in the Youngstown Cartage Company Detroit terminal.

"Q. Did he specify what kind of a tractor or its function?

"A. He did not specify the make, the model, the type of tractor.

"Q. Did he indicate as to whether the tractor would be used in the city of Detroit, or would it be used over-the-road? Did he say anything with respect to that?

"A. He wasn't explicit at that time concerning the rental of the tractor.

"Q. Or as to what the tractor would be used for?

"A. Not at that time.

"Q. Did he indicate the amount of rental that was to be charged for this tractor?

"A. He did not recall what the rental was to be—what the amount of the rental would be for the use of this tractor.

"Q. Did he indicate at that time anything else with regard to the terms of the rental?

"A. He said the terms of this agreement were oral between he and Rolland McMaster——

Mr. Noonan (Interposing): Your Honor, I object to that, any statements made by Mr. Wolff concerning Mr. McMaster; purely hearsay as to him."

McMaster claims that it was error for the statement of his co-defendant Wolff to have been admitted against him (McMaster) absent a prompt warning by the trial judge to the jury to disregard Wolff's statement completely as far as defendant McMaster was concerned.

Such an admonition was given later in the Judge's charge.

It is defendant McMaster's contention that the admonition to the jury was too long delayed (see **United States v. Duff**, 332 F. 2d 702 (C. A. 6, 1964)) and inadequate when given.

Appellee on the other hand contends that the admonition was adequate and the error in failing to give it coincidentally with the admission of the statement was not prejudicial within the meaning and purpose of Rule 52 (a) of the Federal Rules of Criminal Procedure. Appellee also argues, in effect, that defendant's counsel waived any possible objection.

This last contention is given some weight by the fact that defendant's counsel, after objecting to the testimony on grounds of hearsay, did not request a judicial admonition to the jury that it disregard the testimony as to McMaster, and indeed never did make such a request. The admonition contained in the charge (which we deem adequate) was requested by the prosecution. It is also true that Gylph, the FBI agent, was cross-examined extensively by counsel for Wolff as to statements contradictory to the one objected to and that Wolff's subsequent

statements to Gylph (generally to the effect that the Youngstown-Ram "lease" agreement was not made with McMaster) went into the record without objection from McMaster's counsel.

Whatever merit the waiver argument may have, we choose not to base decision thereon. For obviously, McMaster's counsel was presented with a difficult choice as to whether or not to continue to object to hearsay evidence when it was favorable to his client's position.

The evidence quoted was, of course, plainly admissible as to defendant Wolff as a statement against interest. But as to defendant McMaster's objection on grounds of hearsay, we have another matter.

This was not a conspiracy case. Wolff was not an agent of McMaster and the statement (admissible as to Wolff) was not admissible as to McMaster. 4 Wigmore, **Evidence**, §§ 1076, 1079 (3d ed. 1940).

Further, recently in **United States v. Duff**, *supra*, we have held that a delay in the giving of an admonition to the jury to disregard evidence can be prejudicial.

Here there was error in delaying the admonition, and our question is whether this error was an invasion of substantial rights of defendant McMaster or harmless error?

The proposition that jury verdicts shall not be reversed because of harmless error is set forth both in statute[4] and in rule.[5] Nonetheless, in American courts (particularly

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[4] "Sec. 2111. *Harmless error.*

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U. S. C., § 2111.

[5] "Rule 52. *Harmless error and plain error.*

"(a) *Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 Fed. R. Crim. P.

as distinguished from the English) there is a tendency to give the defendant the benefit of any substantial doubt[6] as to whether the error is harmless—and we have sought here to keep that fact in mind.

Defendant cites **Krulewitch v. United States**, 336 U. S. 440 (1949), to us on this point. In **Krulewitch** we find this discussion:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U. S. C. (1946 ed.) § 391. In **Kotteakos v. United States**, 328 U. S. 750, we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommendation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration

[6] The actual test language employed is, of course, "grave doubt" and "substantial influence" upon the verdict. *Kotteakos v. United States*, 328 U. S. 750, 765 (1946).

may not have been the weight that tipped the scales against petitioner." **Krulewitch v. United States,** *supra* at 444-45.

On our review of the entire record in McMaster's case we find this case at the opposite extreme from **Krulewitch** in the range of criminal appeals claiming error in admission of evidence. Where the court there found "grave doubt" as to guilt, we find (excluding the Wolff statement) that the evidence of McMaster's willful violation of this statute was "overwhelming." **Berger v. United States,** 295 U. S. 78, 89 (1935).

We find this case much closer to the factual situation of **Lutwak v. United States,** 344 U. S. 604 (1953), than to **Krulewitch v. United States,** *supra.*

No other meritorious appellate issues are presented.

The convictions are affirmed.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 166

WILLIAM F. WOLFF, SR.,
Petitioner,
vs.
UNITED STATES OF AMERICA

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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WILLIAM F. WOLFF, SR.,
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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment in the above case of the United States Court of Appeals for the Sixth Circuit, entered in this cause on March 25, 1965. A petition for rehearing was denied on April 21, 1965.

### OPINION BELOW

The opinion of the court of appeals has not as yet been reported, but it is printed in the appendix, (App. 25-38). There was no official report of the case in the United States District Court for the Eastern District of Michigan, Southern Division.

## JURISDICTION

The opinion of the Court of Appeals was entered on March 25, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

## QUESTIONS PRESENTED

I.

Whether the variance between the indictment and the proofs affected the defendant's substantial rights when:

(A) The proofs and the Court's instructions allowed the jury to find the defendant guilty of an offense not charged in the indictment.

(B) The evidence proved a different manner of violating the statute than was charged in the indictment.

II.

Whether the government proved beyond a reasonable doubt the crime charged:

(A) When the element of wilfulness and knowledge was proved only by uncorroborated admissions of the defendant.

(B) When the element of payment and delivery of checks was not established in the district in which the defendant was tried.

## STATUTES INVOLVED

The pertinent statutes are printed in the appendix (App. 38-39).

## STATEMENT

The petitioner, William F. Wolff, Sr., was indicted for violation of Section 186(a) of Title 29 U.S.C.A. by paying and delivering and causing his employer, Youngstown Cartage Company, to pay and deliver certain amounts of money at certain times to his co-defendant, a labor representative of Youngstown's employees. The joint indictment against both the defendants was in 64 counts, and the 32 counts which were applicable to petitioner were identical except for the time and amount of payment alleged:

> "That on or about the 8th day of December 1956, defendant, William F. Wolff, Sr. did unlawfully, wilfully and knowingly pay and deliver and did unlawfully, wilfully and knowingly cause Youngstown to pay and deliver to Rolland B. McMaster, in the Eastern District of Michigan the sum of $172.24, in violation of section 186(a) of Title 29, United States Code and section 2 of Title 18, United States Code." (Count 33, 19a.)

The corresponding 32 counts against Rolland B. McMaster, his co-defendant, were also identical except for time and amount paid:

> "That on or about the 8th day of December 1956, in the Eastern District of Michigan, defendant, Rolland B. McMaster, did unlawfully, wilfully and knowingly receive and accept from Youngstown through Ram Transport Inc. the sum of $172.24, in violation of section 186 (b) of Title 29, United States Code." (Count I, 6a.)

The government first called an F.B.I. Agent who testified as to three conversations with the petitioner in 1961, concerning 36 checks counter-signed by petitioner and pay-

able to Ram Transport, Inc., a Michigan corporation (103a). The Agent stated the petitioner informed him the checks were for rental of a tractor from Ram Transport, Inc. for use in the Youngstown terminal in Detroit, pursuant to an agreement between himself and the owner and/or operator of Ram Transport, Inc. on one occasion (110a); and pursuant to an agreement between himself and his co-defendant, McMaster, on another occasion (106a). The Agent further testified that the petitioner informed him the rental price was $3.00 per hour and that the number of hours of use was to be reported to Youngstown's Office Manager, Flamini, or some other corporate officer and Flamini would then draw checks to Ram based upon the number of hours of which he was informed (107a-112a).

The 36 checks were offered in evidence and received over the objection of petitioner that the indictment charged him with paying to McMaster, whereas the checks were made out to Ram Transport, Inc., a corporation (114a-116a). The Court received the checks in evidence on the ground that the government had stated it intended to prove that McMaster *was* Ram Transport, Inc. and that it expected to show that this was the agency through which the payments were made (117a).

The government called 57 other witnesses. Of this number, 45 were called to refute the claim attributed to the petitioner, through the F.B.I. Agent's testimony, that the payments made pursuant to the alleged agreement, were for the use of a tractor. The majority of these witnesses, some 30 in number, were drivers, clerks, and dispatchers of Youngstown, both in Detroit, and Youngstown, Ohio. Each testified he either knew of no such agreement, and had neither seen nor used such a tractor, or that he had seen a tractor but it was not used or was inoperable, or

that he had seen such a tractor but was uncertain as to its use, color, make and when it was at the Detroit terminal.

One witness was called who had been employed by Youngstown as a midnight dispatcher for one and one-half weeks in May 1956, six years prior, and seven months before the date the first offense was allegedly committed (1002a). Although he did not remember whether he worked there in 1956 or 1957, he did remember that he never heard of Ram Transport, Inc. during this week and did not hear of any lease of a tractor during this week.

Some of the officers and executives testified they had knowledge of the agreement for rental from Ram Transport, Inc. Flamini, the Office Manager, testified he received, from time to time, the report of the hours which the tractor was used (230a-235a). Two other witnesses gave testimony of their recollection of a rental agreement (263a, 839a). The government also introduced into evidence a letter from the petitioner (117a) to Ram Transport, Inc., which set out the terms of the rental agreement (164a). A second letter was offered but was refused because the F.B.I. agent could not identify it (136a). However, the contents were brought out by examination which showed the letter was to terminate the agreement (140a-141a).

The other 11 witnesses were called to demonstrate that Ram Transport, Inc. was owned or controlled by McMaster and that he received certain sums of money from the corporation during and after the period in which the checks were received by it. The evidence did not indicate, nor did the government contend, that Ram Transport was merely a "sham" corporation. On the contrary, the evidence demonstrated that it constituted, and was operated as, a bona fide corporation. None of the checks were endorsed or negotiated by McMaster (719a) and he testified that he received none of the proceeds (1421a-1422a).

The record contains no evidence that the petitioner "wilfully and knowingly paid and delivered and caused Youngstown to pay and deliver" any sum of money to the co-defendant, McMaster. The only evidence against the petitioner was that most of the checks to Ram bore his counter-signature and the uncorroborated statements of knowledge of a connection between Ram and the co-defendant, attributed to him by the F.B.I. Agent. The government called over 40 witnesses to counter a defense which was not made, i.e. a bona fide business transaction under Section 186(c)(3). The petitioner did not make this defense, or any defense; he merely cross-examined the array of witnesses presented by the government. The first claim by the petitioner that he relied on the exception of a bona fide business transaction was in the discussion on the charges to be given by the Court (1848a-1853a).

The 36 checks introduced in evidence as proof of the payment by the petitioner to the co-defendant were all drawn on an Ohio bank. The testimony established that the checks were deposited in an account of Ram Transport, Inc. in Detroit. There was no evidence that the checks were paid in the Eastern District of Michigan. Indeed, there was no evidence concerning the place or method of delivery. The petitioner made Motions for Judgment of Acquittal, at the close of the government's case (1354a) and at the close of all proofs (1791a), which were denied.

The Court in charging the jury refused to give an instruction requested by the co-defendant (2061a), that the Statute of Limitations would bar any conviction for *agreeing* to make the prohibited payments (2038a). The Court did, however, charge the jury as follows:

> "Defendant Wolff in this case relies upon what is called a statutory exemption. The statute under which the Government brings this prosecution, as I have read it to you—and I better read it right now:

These counts, all of the counts in the indictment, are drawn under Section 186, or at least charge an offense under Section 186 of the United States Code, Title 29, and, in relation to the counts which have to do with Mr. Wolff, the 32 counts charged against Mr. Wolff:

(Reading)

'It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or any——' I will read it over again.

'It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money to any representative of any of his employees who are employed in an industry affecting commerce.'

And the statute, as it applies to the counts charged against Mr. McMaster, read as follows:

(Reading)

'It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money.'

Those are the two sections of the statute, of the law, that have application to all of the counts in the indictment as they apply to both Mr. Wolff—the first section I read applies to the counts charged against Wolff and the second section applies to the counts charged against Mr. McMaster.

And, I will read again:

'Defendant Wolff in this case relies upon what is called a statutory exemption. The statute, part of which I have just read, under which the Government brings this prosecution, as I have read

it to you, provides that the provisions making certain payments unlawful are not applicable with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business. Defendant Wolff having relied upon such an exemption, and evidence having been adduced in regard thereto, the burden of proving that the payments did not fall within the statutory exemption is upon the Government' " (2025a-2027a).

The Sixth Circuit Court of Appeals affirmed the conviction. It held that it was not necessary under the modern rules of pleading to allege the conduit through which the payments were made or to allege each step of the payments. It further held proper venue was established by deposit and collection of the checks, drawn on an Ohio bank, in the Ram Transport bank account in Detroit. This sufficiently represented a payment in the Eastern District of Michigan. In any event, that court said, objection to venue was waived because it was not made prior to the verdict. The opinion was devoted almost entirely to a recapitulation of the facts. The Court concluded the evidence was "overwhelming".

A petition for rehearing was denied on April 21, 1965.

## REASONS FOR GRANTING THE WRIT

I. (A) It is the petitioner's contention that the instructions by the court were prejudicial in that the jury may have convicted him of a crime that was not charged in the indictment. The statute declares that it shall be unlawful *to make* the proscribed payments or *to agree to make* the proscribed payments. Each is a separate offense, *Burton v. U.S.*, 202 U.S. 344, 50 L. ed. 1057 (1901). The petitioner was indicted for paying and delivering, and causing Youngstown to pay and deliver money to the co-defendant.

The government's first witness the F.B.I. agent, testified the petitioner had told him of a rental agreement with Ram Transport, Inc., or with the co-defendant. It further established through the same witness, that two letters existed which related to the agreement. The first confirmed the oral agreement and the second terminated it. At least three of the witnesses (Flamini, Altenderfer, Potocki) further bolstered the contention that some sort of agreement did exist. This served to firmly establish in the minds of the jury that an agreement had been made. Thirty-six checks in varying amounts from Youngstown to Ram Transport, Inc. were also introduced in evidence over defense objections. The government proceeded to call more than 40 witnesses to demonstrate that: (1) no tractor was ever received from Ram Transport, Inc., or (2) if it was received, it was not used and/or was not capable of being used. This evidence firmly established in the jury's mind that the payments were made but nothing was received in return. The testimony and exhibits were presented in the government's case-in-chief before any defense was made.

The court refused a request by the co-defendant to instruct the jury that a conviction for agreeing to pay was barred by the statute of limitations. The court instructed the jury by reading the statute, including the portion relating to *agreeing* to pay or to deliver money to a labor representative. It further stated that the section it had read applied to all counts in the indictment as they applied to the petitioner.

The jury was therefore allowed to find the petitioner guilty of either: (1) having made unlawful payments to the co-defendant, or (2) having *agreed* to make unlawful payments to him. It returned a verdict of "guilty as accused".

The jury may have been unconvinced that the checks signed by the petitioner were for the rental due on an

alleged tractor. However, it may also have been unconvinced that the checks knowingly reached the co-defendant. On the basis of the evidence and instruction, it might therefore, have concluded that the petitioner had at least agreed to make the proscribed payments and accordingly returned a guilty verdict. Whether or not this actually happened cannot now be determined. However, the likelihood of this being the case is certainly a strong one, especially in view of the fact that the jury is presumed to have followed the instructions given. *Delli Paoli v. U.S.*, 352 U.S. 232, 242.

The petitioner did not object to the instruction as given. Nevertheless, under the "plain error" rule, an objection is not a mandatory condition precedent to raising the error on appeal. *Title 18, U.S.C.A., Rule 52(b), Rules of Criminal Procedure.* Many cases have held that where "plain error" was committed in the instructions, such error may be raised on appeal even though no objection was made when the alleged erroneous instruction was given, *Sherwin v. U.S.*, 320 F.2d 137, cert. den. 84 S. Ct. 481, reh. den. 845 S. Ct. 796 (1963); *Taylor v. U.S.*, 222 F. 2d 398, 95 U.S. App. D.C. 373 (1955). The "plain error" in the case at bar is that the jury was instructed on the charge of *agreeing* to make such payments. And the petitioner was not so charged in the indictment.

In *U.S. v. Roach*, 321 F. 2d 1 (1963), a strikingly similar case on this issue, the defendant was charged with "putting in jeopardy" the lives of certain bank employees by using a gun to commit a robbery. The statute under which he was charged read that whoever in committing the offense "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or devise * * *" (18 U.S.C.A., Sec. 2113).

The Court in its instructions to the jury read the statute including the part relating to "assaults any person". The

Third Circuit Court of Appeals held this was error under *Stirone v. U.S., infra,* and was so clear that the appellant was not precluded from raising it notwithstanding that he failed to object to the charge.

In *Stirone v. U.S.,* 361 U.S. 212, 80 S. Ct. 270, 4 L.ed. 2d 252 (1960), the defendant was charged with interfering with interstate commerce by obstructing the movement of sand from outside Pennsylvania to a concrete manufacturing plant in that state. The government was permitted to introduce evidence of an effect on interstate commerce in that the concrete to be made from the sand was used for constructing a mill which would manufacture steel to be shipped in interstate commerce. The Court also instructed the jury that the guilt as to the interstate commerce aspect could rest on a finding that the sand had been shipped from another state into Pennsylvania or that the concrete was used for constructing a steel mill which would manufacture steel to be shipped in interstate commerce.

The Supreme Court held it was error to submit the second question to the jury. The indictment did not include it and the indictment could not be amended or broadened except by the grand jury. Citing *Ex parte Bain,* 121 U.S. 1, 7 S. Ct. 781, 30 L.ed. 849 (1887), the Court held that a trial court can not permit a defendant to be tried on charges that are not made in the indictment.

The foregoing contention was presented to the Sixth Circuit Court of Appeals on the appeal and again in the Petition for Rehearing, which was denied. It did not see fit in either instance to comment on it. It is submitted that the decision in the case at bar, conflicts with *Stirone* and *Roach, supra.* It is also noteworthy that it conflicts with previous decisions of the Sixth Circuit, *Maxwell v. U.S.,* 277 F. 2d 481 (1960); *Epstein v. U.S.,* 174 F. 2d 754 (1949).

B. Each of the 32 counts of the indictment against the petitioner states that on a certain date he did unlawfully, wilfully and knowingly pay and deliver and cause Youngstown to pay and deliver a certain sum of dollars to the co-defendant. It is apparent that the indictment is drawn from the language of the statute. It is equally apparent the indictment states a violation under the statute, which outlaws all payments between an employer and a labor representative with stated exceptions, *U.S. v. Ryan*, 350 U.S. 299, 76 S. Ct. 400, 100 L. ed. 335 (1956). However, the government presented proof of a substantially different nature. Taken in its most positive form, it demonstrates that the payments were not money but checks, that the payments were not delivered to the co-defendant, but to Ram Transport, Inc. It did not even show that the checks were merely delivered to, and received and relayed by, Ram Transport, Inc. to the co-defendant. Instead, viewing the evidence as most favorable to the government, it showed the checks were delivered to and received by Ram Transport, Inc., were endorsed by Ram Transport, Inc. and deposited in a Ram Transport, Inc. account. It was then shown that the co-defendant during this period received substantial amounts of money from Ram Transport, Inc. However, the total amount received by him from Ram was greatly in excess of the total amount of the checks. In addition, the periodic amounts received by the co-defendant from Ram bear no relationship to the corresponding periodic amounts delivered by the petitioner to Ram. The evidence also showed that Ram paid for a boat owned or used by the co-defendant, that it paid the operating expenses of the boat, and that the funds from the sale thereof were redeposited in the Ram account. The evidence also showed money was lent by Ram to the co-defendant to buy land in Florida and that the loan was subsequently repaid. The government did not claim that Ram Transport, Inc. was a "sham" corporation. On the contrary, its evidence demonstrated that it was a bona

fide corporation. The indictment itself, in the first 32 counts referred to it as such.

The appellate court held that the petitioner was adequately informed of the charges against him. It held that "modern" rules of pleading do not require alleging each "step" of payment, citing *Korholz v. U.S.*, 269 F. 2d 897 (1959). It is apparently of the opinion that proof of an agency method is proof of a direct method of violating the statute which was charged. It further held that the conduit for payment was adequately set out in the indictment drawn against the co-defendant. It apparently indulges in the curious reasoning that a defendant may discover the specific nature of the charges against him by consulting the indictment drawn against his co-defendant. Then by making a comparison between the two, determine that the grand jury did not mean what it specifically charged against him.

It is submitted that this is not the correct test to be applied. The decision is in conflict with *Russell v. U.S.*, 369 U.S. 749, 8 L.ed. 2d 240, 825 S.Ct. 1038 (1962), and with *Stirone, supra. Russell* specifies two criteria for testing the sufficiency of an indictment. The first is "whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet." (369 U.S. 749, 763). It is felt the facts presented above amply demonstrate that the indictment did not contain the elements of the offense *intended* to be charged, nor did it sufficiently apprise the petitioner of what he must be prepared to meet.

The decision also conflict with *U.S. v. Lippi*, 193 F.S. 442 (1961). *Lippi* refused to follow *Korholz, supra,* which the appellate court here relied upon, and applying *Stirone, supra,* held the correct test to be: "whether there is a sub-

stantial possibility, tested from the perspective of the presumption of innocence, that counsel will be unprepared to meet proof inconsistent with the charges contained in the indictment." (193 F.S. 439, 442.) While this is only a decision of a district court, the analysis of the issue is completely in conflict with the decision of the case at bar.

In *U.S. v. Raysor,* 294 F.2d 563 (1961), the Third Circuit rejected the agency theory of *Korholz.* The indictment charged the defendant with having sold narcotics to an agent of the Narcotics Bureau. The proofs showed the defendant had sold the narcotics to a "stool pigeon" who had been given the purchase money by the agent who had searched him immediately before and after the purchase. The Narcotics Bureau agent had been present at the sale and had taken immediate possession of the narcotics. The Circuit Court refused to accept the government's theory of agency that sale to an agent was sale to the principal. It held there was a fatal variance between indictment and proof, citing *Stirone* to the effect that the defendant has a substantial right to be tried only on charges presented in an indictment. It rejected the government's effort to "salvage its manifestly sloppy indictment."

The same rationale applies to the instant case. If the government intended to prove an indirect payment through a corporation it should have charged an indirect payment. Instead it chose to charge a direct payment and prove an indirect payment. It is interesting to note that it charged and attempted to prove an *indirect receipt* by the co-defendant through the corporation. It then reversed its own theory and attempted to prove what it had alleged was an *indirect receipt* by one defendant was a *direct payment* by the other defendant.

The appellate court further states the petitioner did not move for a bill of particulars. (The co-defendant did, and the motion was denied 39a). It overlooked the fact that there was no reason to do so prior to the presentation of the government's case. The indictment undoubtedly states an offense. The petitioner's contention is that it did not sufficiently apprise him of the offense which the government intended, and subsequently attempted, to prove. *Russell, supra,* also holds that it is a settled rule that a bill of particulars cannot save an invalid indictment. The indictment here was bad not because it failed to state an offense, but because it failed to state with sufficient particularity the offense which the government intended to prove. It also failed to provide the petitioner with the opportunity to prepare to meet proof inconsistent with the charges in the indictment. This failure did not become apparent until the government had commenced its case.

It is not that the facts as proved do not constitute a violation.. It is that this type of proof of a violation is not decipherable from the language of the indictment. The knowledge of the petitioner, after reading the indictment, as to the type of proof which he would be required to meet and the defense he would make, is significantly different from that of the evidence presented in support of the indictment.

There is a substantial difference between a simple charge that one paid money to another in specified amounts at specified times, and proof that he gave checks to a third party which deposited them in its account and then made money from this account available to another in the form of cash, the use of a boat, or loans to buy land. It is apparent that Ram was much more than merely a "conduit" to funnel payments to the co-defendant.

The variance demonstrated was prejudicial in that the petitioner expected and prepared to refute proof that he had made direct payments to the co-defendant. The government then presented proof of an indirect payment which it claimed was a direct payment on the theory that the co-defendant *was* the corporation. If this was the government's theory it is difficult to comprehend why the co-defendant was charged with receiving payment through the corporation. It is equally difficult to comprehend why the allegations of the joint indictment were different as to each defendant concerning the manner of making and receiving payment. If the payment was direct because the co-defendant *was* the corporation, why was the receipt not direct also?

When the method became apparent by which the government intended to prove its case, it was then too late for the petitioner to attempt to alter his theory of defense. The heart condition for which he was excused from trial for a period (488a) of time precluded his taking the stand to negative the government's unexpected method of proof.

The purpose for the requirement that the indictment inform the defendant of the specific charges against him is to allow him to prepare his defense before commencement of trial, not during the trial or after the government has presented its case. The confusion which still existed in the minds of the parties, except possibly the government, is evidenced by the discussion which took place during the examination of the requests to charge (1848a-1853a).

II. (A) The essence of the indictment was that the petitioner did unlawfully, wilfully and knowingly pay and deliver and cause Youngstown to pay and deliver certain amounts of money to the co-defendant. The government's first witness, the F.B.I. agent, testified that the petitioner

told him, on one occasion, that the 36 checks in question were paid by Youngstown to Ram Transport, Inc. for rental of a tractor pursuant to an agreement between the petitioner and the co-defendant. The agent further testified that, on another occasion, the petitioner told him the agreement was made with an officer of Ram Transport, Inc., whom he did not know.

The remainder of the government's evidence, both testimony and exhibits, was directed to the other essential elements of the alleged crime. Considered from the viewpoint most advantageous to the government, the evidence established that payments were made to Ram Transport, Inc., that the petitioner caused these payments to be made, that no value was received for these payments, that the co-defendant owned or controlled Ram Transport, Inc., that the co-defendant was a labor representative of Youngstown's employees, and that the petitioner knew the co-defendant was such a representative. In short, it established all the essential elements of the crime except that the petitioner wilfully and knowingly made these payments to the co-defendant. The only evidence of this element was the uncorroborated testimony of the F.B.I. agent. None of the other evidence corroborates this element; it was established by the admission alone. The record contains no other evidence that the petitioner knew or intended that the co-defendant would or should receive any of the checks, the proceeds therefrom, or any of the other benefits allegedly received by the co-defendant from Ram Transport.

The Appellate Court stated that petitioner relied merely on the defense of "fair market value", which the Government disproved. In effect, it holds he was convicted because he was unable to prove this defense. This is erroneous, both in fact and in the underlying assumptions.

In fact, the petitioner did not make the defense of "fair market value" except as it may be inferred from his cross-

examination of the witnesses *called by* the *government before* he had made *any* defense. He first mentioned that this was his defense at the time the Court was discussing the charge to be given the jury, which was after both sides had rested and the Court had denied petitioner's motions for acquittal.

The underlying assumptions are also erroneous. The Appellate Court stated the evidence established that Ram was owned by the co-defendant, that payment to it was payment to him for purposes of the statute, and that this was not a bona fide exchange for "fair market value". If payment to Ram was payment to the co-defendant, it is difficult to understand the need for and purpose of the evidence that he received money, loans and other benefits from Ram. It is also difficult to understand the Appellate Court's emphasis on this evidence. If payment to Ram was payment to the co-defendant, i.e. if he *was* Ram as alleged and supposedly proved, what is the relevance of this evidence? If the co-defendant *was* Ram and any payment to it was payment to him, there would be no necessity for proof that he received the money or other benefits from Ram.

There is an apparent confusion of the evidence, the necessary elements requiring proof, and the petitioner's defense. The defense of "fair market value received" becomes operable only when the defendant has admitted, or it is proved, he wilfully and knowingly made illegal payments to a proscribed person. His defense would then be that it was a *quid pro quo* transaction. However, it must first be proved that payments were made to a proscribed person. The petitioner made no admission that he made any payments to the co-defendant, nor did the evidence show he made any such payments, except for the uncor-

roborated testimony of the F.B.I. agent. Conversely, assuming payment to Ram was payment to the co-defendant, it would still be necessary to prove the petitioner knew that the co-defendant owned Ram to establish wilfulness and knowledge.

Therefore, the result remains the same regardless of the manner in which the problem is approached. The record is barren of any corroborating evidence that the petitioner wilfully and knowingly paid money to the co-defendant directly or to Ram Transport with knowledge that the corporation was owned by, or would "funnel" the money to, the co-defendant.

The decision of the Appellate Court is in conflict with *Opper v. U.S.*, 348 U.S. 84, 99 L.ed. 101, 75 S.Ct. 158 (1954) and *Smith v. U.S.*, 348 U.S. 147, 99 L.ed. 192, 75 S.Ct. 194 (1954). In *Opper* it was held that admissions by a defendant must be corroborated by other evidence. The Court also considered the extent of corroboration necessary to support a conviction:

> "However, we think the better rule would be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. (Citing *Smith*) It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts, plus the other evidence besides admission must, of course, be sufficient to find guilt beyond reasonable doubt". (348 U.S. 84, 93).

It held that there was "substantial independent evidence to establish *directly* the truthfulness" of the defendant's admission that he had paid money to a government employee. There was proof of a long distance call by the defendant to the employee's home, a check cashed by the defendant, and a round trip air line ticket in the employee's name to the defendant's home and return.

In the instant case, the independent evidence did not directly establish such truthfulness. It established the remaining elements of the crime but in no way furnished any further proof that the petitioner knew the co-defendant had any interest in or connection with Ram Transport or that he made or intended to make any payments to the co-defendant.

In *Smith* it was held that "all elements of the offense must be established by independent evidence or corroborated admissions, but one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused." (348 U.S. 147, 157.) The government may provide the necessary corroboration by introducing substantial evidence, apart from the defendant's admissions tending to show the defendant wilfully committed the offense.

In the instant case no such independent evidence was introduced to bolster the admission that the petitioner knew he had made the agreement to pay with the co-defendant. The trial court specifically recognized this fact (1815a). All of the evidence showed that the payments were made to Ram Transport, Inc., a bona fide corporation. There was no further evidence that the petitioner had any knowledge of any connection between Ram Transport and the co-defendant. It proved neither knowledge that the

payments would be passed on to the defendant nor knowlege that the co-defendant owned, and therefore "was", the corporation. The direct evidence may have proved all the remaining elements *except* that payments were wilfully and knowingly made to the co-defendant, either directly or through a corporation which the petitioner knew the co-defendant owned or with which he knew the co-defendant had some connection.

II. (B) The indictment charged the petitioner "paid and delivered" the particular sum in each of the counts "in the Eastern District of Michigan". The evidence showed checks were made in Youngstown, Ohio, at petitioner's direction, to Ram Transport, Inc. It further showed the checks were endorsed by the corporate secretary of Ram Transport, Inc., who was the estranged wife of the co-defendant, and deposited in the Ram Transport, Inc., account in the Detroit Bank & Trust Company. The record contains no proof as to either where, when, or how, the checks were delivered to Ram.

It is well settled that the Government must prove venue in the district where the defendant is tried and without such proof there can be no conviction, *U.S. v. Jones*, 174 F2d 746 (1949), 7th Circuit; *U.S. v. Browne*, 225 F.2d 751 (1955), 7th Circuit. Inasmuch as the Government charged payment and delivery in the Eastern District it would be incumbent upon it to at least establish that one or the other, if not both, occurred in the district charged, to establish venue. There was no evidence to show delivery in the Eastern District. Moreover, assuming *arguendo* that the checks were delivered to Ram Transport in the Eastern District on the alleged dates, there is still a complete lack of proof that payment was made in that district. The petitioner moved for acquittal after the Government had rested and again at the conclusion of the case.

The applicable law of Michigan at the time of the alleged offenses stated that:

> "* * * where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be sub-agent of the depositor but shall be authorized to follow the instructions of its immediate forwarding bank and any credit given by any such agent or sub-agent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given on the books of another bank, which such agent has requested or accepted." (Mich. Stat. Ann. Sec. 23.332, C.L. '48, Sec. 487.602.)

A subsequent section stated: "An endorsement of an item by the payee or other depositor 'for deposit' shall be deemed a restrictive endorsement and indicate that the indorsee bank is an agent for collection and not owner of the item." (M.S.A. Sec. 23.334, C.L. '48, Sec. 487.604.) A third section relates "* * * where the item is received by mail by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer." (M.S.A. Sec. 23.337, C.L. '48, Sec. 487.607.)

It is evident from the foregoing that payment was not proved to have taken place in the Eastern District of Michigan nor could it have been proved. The checks were drawn on, and paid, at a Youngstown, Ohio bank. The only act proved to have taken place in the Eastern District was the deposit of the checks in the Ram Transport account in Detroit. The Michigan statute cited above demonstrates that such a deposit constitutes only a conditional credit and makes the depository bank only an agent of the depositor for collection. The deposited check is "paid" when the

account of the drawer is charged, which in the instant case would have taken place in Youngstown, Ohio.

The Government recognized that neither payment nor delivery was proved to have taken place in the district and attempted to invoke the rule relating to a "continuing offense". The Sixth Circuit had previously held that such offenses are not continuing ones and that each act constitutes a single offense, *Krogmann v. U. S.*, 225 F2d 220 (1955). The Supreme Court in *Burton v. U.S.*, 196 U.S. 283, 49 L.ed. 482 (1905) had previously made the same holding in a case involving a similar offense.

However, the Sixth Circuit held in the instant case:

> "As to venue, we believe that deposit of the Youngstown checks in the Ram Transport bank account in Detroit (and collection thereon) was sufficient to represent payment of money in the Eastern District of Michigan.
>
> Further, no objection having been made to venue prior to verdict, objection thereto was waived. *Cagnina v. United States*, 223 F. 2d 149 (C.A. 5, 1955); *Thomas v. United States*, 267 F. 2d 1 (C.A. 5, 1959)."

The holding in the first paragraph conflicts with *Burton v. U.S., supra*, which held that venue was established in that case because the checks in question were passed by the defendant to the depository bank *unconditionally and without any special understanding*. Even under those facts, Justice Harlan dissented on the ground that the depository bank was only the agent for the defendant to present the checks for payment and receive the proceeds therefrom. The Michigan Statute as quoted above has reversed the assumption as to whether the deposit of checks is unconditional. All deposits are conditional and

the bank is only the agent of the depositor for presentment and payment of the checks.

The holding in the second paragraph conflicts with the other circuits. The Second Circuit in *U.S. v. Gross*, 276 F.2d 816 (1960), held that when the indictment alleges proper venue the defendant is entitled to await the government's case and move for acquittal when the government fails to prove all elements charged to have occurred in the district in fact occurred there. The Seventh Circuit in *U.S. v. Jones, supra*, held that a motion for acquittal made at the conclusion of all evidence properly raises the question of venue. In *U. S. v. Brothman*, 191 F. 2d 70 (1951), the Second Circuit adopted *Jones* and stated that the motion for acquittal need not specify the grounds therefor to raise the question of venue.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari in the above entitled cause should be granted.

Respectfully submitted,

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# APPENDIX

Nos. 15828-29

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
ROLLAND B. MCMASTER,
*Defendant-Appellant.*

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
v.
WILLIAM F. WOLFF, SR.,
*Defendant-Appellant.*

Appeal from the District Court for the Eastern District of Michigan, Southern Division.

## DECISION

Decided March 25, 1965

Before: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. These appeals are from the convictions of a trucking company president (Wolff) and a Teamster Union official (McMaster) for violation of 29

U.S.C. §186.[1] This statute prohibits payment of money or "other thing of value" by an employer to, and acceptance of same by a representative of his employees, except in certain instances, including the sale of "goods or commodities for fair market value."

There were 32 counts in each indictment against each defendant alleging payment and acceptance of 32 separate sums, totaling $8,823.48, between September 12, 1956 and July 17, 1959. The Wolff indictment alleged that he caused the Youngstown Cartage Company, of which he was president, to make the payments to McMaster. The McMaster indictment alleged that he received the payments through Ram Transport, Inc. During the critical period McMaster was an official of Local 299—a Detroit local of the Teamsters Union—some of whose members were employed by Youngstown Cartage. Prosecution evidence tended to establish that at the same time McMaster was president and controlling stockholder of Ram Transport, Inc.

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[1] §186. *Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds*

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . .

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . . " 29 U.S.C. §186. (The statute as noted above was applicable during the period covered by these indictments. It has since been amended. See Title 29 U.S.C.A. §186, 1964 Cumulative Annual Pocket Part.)

Both men were tried jointly before a jury in the United States District Court for the Eastern District of Michigan, Southern Division. No motion for severance was made; but at trial the two defendants took different positions. Wolff, through his counsel, relied primarily upon the exception contained in Sec. 186 alleging that the disputed payments were "fair market value" for the rental by Youngstown of a truck owned by Ram. McMaster relied primarily upon denial that he knew anything about such payments, since he claimed he had given Ram Transport, Inc., to his wife prior to the dates of the payments.

Both of these arguments are reiterated before us on this appeal. A review of this lengthy record convinces us (as it did the jury) that evidence produced by the prosecution established that Ram Transport, Inc., was owned by McMaster during the period in question; that payment to it was payment to him for purposes of 29 U.S.C. §186; and that this was not a bona fide exchange of goods or services "for fair market value."

Most of the facts essential to the view just stated are actually undisputed in this record.

The facts establishing the 32 payments totaling $8,823.48 by Youngstown to Ram Transport, Inc., on the dates in question are undisputed.

The facts establishing the deposit (and collection) of these 32 checks in the Detroit Bank & Trust Company account of Ram Transport, Inc., are undisputed.

The fact that defendant Wolff was president and controlling stockholder of Youngstown Cartage Company during the period of these payments is undisputed.

The fact that defendant McMaster was business agent of Local 299 is undisputed, as is the fact that some of Youngstown's employees were members of Local 299.

The fact that defendant Wolff caused these payments to be made by Youngstown to Ram is undisputed.

The fact that Wolff himself personally drew a majority of the checks in question is undisputed.

The fact that defendant Wolff and defendant McMaster knew each other, met socially, and were involved in other substantial business ventures together is undisputed.

The fact that prior to the period of these payments defendant McMaster was controlling stockholder of record of Ram is undisputed. (McMaster owned 132 shares; Edward J. Powers owned 5 shares.)

The fact that during the period of these payments the corporate records remained unchanged in this regard is undisputed.

The fact that defendant McMaster had access to substantial sums of money from Ram during the period of these payments is undisputed.

And, finally, the fact that during all of the period in question McMaster was frequently involved both in Detroit and in Chicago in representing Youngstown's employees as a Teamster business agent in direct negotiations with Wolff is also undisputed.

Two factual disputes are advanced—one by each defendant.

Wolff claims the payments were for rental of a truck owned by Ram for use by Youngstown division in Detroit. The prosecution undertook the burden of proving the negative of this defense. In so doing they called all of Youngstown's terminal supervisors in Detroit, six office employees from the Youngstown office, and twenty of their Detroit truck drivers. The evidence is too lengthy and repetitive to summarize, but we have read it in full and conclude that the overwhelming weight of the evidence indicates that there was no such Ram-owned truck employed by Youngstown at the Detroit terminal during the period in question.

Against this evidence defendant Wolff's witnesses did not identify the make, the weight, the license, or a specific date of use or a specific load carried. The jury plainly concluded, as they had a clear right to do, that there was no such truck.

McMaster claims that, without any record being made thereof, he gave ownership of Ram Transport, Inc., to his wife prior to these payments; that he was estranged from her during the period of the payments, and that he had no knowledge of them. These assertions appear to us to be largely upsupported and obviously they proved unpersuasive to the jury. McMaster's credibility was continually challenged on these and many other points during his testimony at trial. Plainly, the jury disbelieved him. A careful reading of McMaster's own testimony convinces us that the jury had a clear right to reach this conclusion.

McMaster relied primarily upon the facts that during the period in question his wife kept the books of Ram Transport, Inc., and signed all the checks on the Ram Transport account in the Detroit Bank & Trust Company, and that his was not an authorized signature as to the Ram Transport account during this period. He claimed that he and his wife had been separated in May of 1956 and that at that time he gave her Ram Transport, Inc., as to which he had acquired 100% of the stock in his own name on February 17, 1956.

No legal record of any such division of marital assets was ever made until a property setlement between McMaster and his wife Yvonne was signed December 19, 1960, prior to a decree of divorce between the parties, dated February 27, 1961.

During all the period in question it is undisputed that defendant McMaster and Yvonne McMaster maintained a joint savings account and a joint checking account at the Detroit Bank & Trust Company. McMaster admits that joint income tax returns were filed by him and his wife Yvonne for the years 1956 and 1957. The statutorily required Corporation and Securities Commission reports made to the state of Michigan by Ram Transport, Inc., which defendant McMaster claims were prepared and signed by his wife Yvonne without his knowledge, showed

defendant Rolland McMaster as president and 100% stockholder of Ram Transport, Inc., during the years 1956, 1957 and 1958.[2]

Defendant McMaster contends that the division of property in 1956 between him and his wife Yvonne included her exclusive ownership of Ram and his exclusive ownership of another trucking company called M & G Trucking Company. But it appears that Yvonne McMaster was authorized to sign checks on the M & G Trucking Company account during all of this period and that he wasn't——exactly the same situation as prevailed in relation to Ram.

Yvonne McMaster did not testify in this trial She had died May 26, 1961.

It may be pertinent to quote McMaster's own testimony as to his relationship with her during the period covered by this indictment.

> "Q. (By Mr. Noonan) Now, if the decree was dated February 27, 1961, how can you account for the fact that this division of property you just referred to took place in 1956, five years earlier?
>
> "A. As I said about five minutes ago, I kept the M & G Trucking Company; she kept Ram Transport, and we had made an agreement. That is what it was. Nobody was—this wasn't one of those things where everybody is mad. We were still friends. After this was over, she also kept the books for my farm and she —we weren't mad at each other as far as not speaking to each other.
>
> "Q. Did you continue to be associated in business with her?
>
> "A. Well, in this respect, I helped her every way I could help her, and Mr. Powers also, and kept right on.

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[2] We believe the District Judge was correct in admitting these exhibits. 28 U.S.C. §§1732-1733. See also Rule 44, Fed. R. Civ. P.

"Q. Did she during this period or subsequent to the early part of 1956—May, I believe you said—did she keep the books for M & G Truck Company?

"A. M & G, she kept the books for them also, yes. She kept them for the farm and M & G Trucking.

"Q. Now, after this separation in 1956, Mr. McMaster, what further connection did you have with Ram Transport?

"A. Well, the only connection I had with Ram Transport after that was any way that I could help either he or she, I helped them. That is the only connection I had with the outfit."

This last observation by McMaster does not, however, appear to be entirely accurate.

The facts show substantial access to Ram funds on the part of Rolland McMaster personally during all of this period.

1) It is undisputed that on August 31, 1957, a credit of $1,500 to Rolland McMaster was entered on the Ram books to wipe out a loan previously owed by McMaster to Ram.

2) McMaster admits that a Ram check, dated July 18, 1958, for $3,000 was used by him for an investment in an Oakland County land deal. It is not claimed that this was ever repaid.

3) McMaster admits that a Ram check, dated February 15, 1960, for $3,000 was paid to the Idle Acres Farm account as to which he claimed sole ownership. This check was marked "Loan" on the Ram books, but apparently has not been repaid.

4) McMaster admits that a Ram check, dated May 12, 1959, for $12,503.50 was used by him for an investment in a Florida land deal.[3] It appears that this amount was repaid to Ram on August 14, 1959.

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[3] On the occasion of this payment it is interesting to note that appellee's Exhibit 55 shows a Ram bank balance of $12,736.60 before deduction of the check for $12,503.50, and a balance of $233.10 thereafter.

5) McMaster admits that a 32-foot Chris Craft boat was purchased for him out of Ram funds in May of 1956, the purchase price being $9,000. It appears that the down payment was made on this boat by a Ram check, dated May 23, 1956, in the amount of $1,000.

And McMaster admits that the other payments on the boat were likewise made by Ram, as well as payment of expenses for the operation of the boat. It also appears that when the boat was sold, although McMaster is positive in asserting his personal ownership, the funds derived from the sale were redeposited in the Ram account.

6) It is also undisputed that Ram checks totaling $9,950 were deposited in the joint account maintained by McMaster and Yvonne McMaster during the period July 18, 1958 to May 23, 1960. McMaster's testimony in this regard is that though he had the right to write checks on this account, he never did, and that these funds were used by Yvonne for her separate business ventures and expenses.

McMaster, as indicated above, did indeed separate from Yvonne McMaster and a decree of divorce was ultimately entered between them in February of 1961.

Subsequent thereto McMaster was married again to an Elaine Mastaw. Cross-examination revealed that prior to his marriage to the present Mrs. McMaster, and during the period of 1956-1959, McMaster had also "helped" Elaine Mastaw establish a truck leasing company and that she and her brother had been involved in Youngstown Trucking Company's purchase of a site for a new terminal in Detroit. As McMaster put it: "I think she [Elaine Mastaw] and he [Miss Mastaw's brother] helped him [defendant Wolff] find a piece of land to put his trucks on and was involved in a house on the land."

The basic purpose of the statute under which these defendants were convicted is to prevent corruption in labor-management relationships affecting interstate commerce. The statute plainly does not require proof of the *quid pro quo*.

The Supreme Court has set forth this interpretation of the purposes of the statute:

> "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative.
>
> "The legislative history supports these conclusions. As passed by the House of Representatives, the Hartley Bill forbade employer contributions to union welfare funds, and made it an unfair labor practice to give favors to 'any person in a position of trust in a labor organization. . . .' H.R. 3020, 80th Cong., 1st Sess., §8(a) (2). The scope of this bill was enlarged when it reached the Senate to include, in the words of Senator Taft, a 'case where the union representative is shaking down the employer. . . .' 93 Cong., Rec. 4746. The resulting Senate amendment made it criminal both for the employer and the 'representative' of employees to engage in such practices." *United States v. Ryan*, 350 U.S. 305-06 (1956).

We feel that there is ample evidence from which the jury could have found that each of these defendants was guilty beyond a reasonable doubt.

While under the situation just referred to above we do not reverse on factual grounds, for purposes of issues to be dealt with subsequently, we also note that on this lengthy record the evidence establishing willful violation of Sec. 186 by these defendants was not merely ample, it was, in our judgment, overwhelming.

Both appellants also attack the indictments as constitutionally vague and contend that venue was not established in the United States District Court for the Eastern District of Michigan, Southern Division.

We believe the indictments were sufficiently clear and specific to meet all constitutional requirements. Defendant Wolff specifically complains that he was charged with paying money to McMaster and that his indictment did not

allege the conduit (Ram Transport, Inc.) through which the payments were claimed to have been made. We find no necessity under modern rules of pleading of alleging each step of payments in the indictment. *Korholz v. United States of America*, 269 F.2d 897, 901 (C.A. 10, 1959). Rule 7(a), Federal Rules of Criminal Procedure.

Further, in the McMaster indictment (drawn and filed at the same time) this conduit for payment was spelled out. Defendant Wolff did not move for a bill of particulars prior to trial.

We think that defendants were adequately informed of "the nature and cause of the accusation." *United States v. Dickerson*, 337 F.2d 343 (C.A. 6, 1964).

As to venue, we believe that deposit of the Youngstown checks in the Ram Transport bank account in Detroit (and collection thereon) was sufficient to represent payment of money in the Eastern District of Michigan.

Further, no objection having been made to venue prior to verdict, objection thereto was waived. *Cagnina v. United States*, 223 F.2d 149 (C.A. 5, 1955); *Thomas v. United States*, 267 F.2d 1 (C.A. 5, 1959).

The only substantial claim of error we have found in our review of these briefs and records is that of McMaster pertaining to the admission of an FBI agent's testimony concerning statements made to him by Wolff as set out below:

"Q. (By Mr. Merrill) With respect, first of all, to June when you talked to him in June, did you discuss with him on that occasion the payments from Youngstown Cartage to Ram Transport?

"A. Yes, I did.

"Q. Did he indicate to you whether or not such payments had been made?

"A. He did.

"Q. Did he indicate as to any reason for the making of these payments?

"A. Yes, he did.

"Q. What did he say with respect to that, in June of 1961?

"A. Mr. Wolff at that time said that these payments were for rental of a tractor type truck for use in the Youngstown Cartage Company Detroit terminal.

"Q. Did he specify what kind of a tractor or its function?

"A. He did not specify the make, the model, the type of tractor.

"Q. Did he indicate as to whether the tractor would be used in the city of Detroit, or would it be used over-the-road? Did he say anything with respect to that?

"A. He wasn't explicit at that time concerning the rental of the tractor.

"Q. Or as to what the tractor would be used for?

"A. Not at that time.

"Q. Did he indicate the amount of rental that was to be charged for this tractor?

"A. He did not recall what the rental was to be—what the amount of the rental would be for the use of this tractor.

"Q. Did he indicate at that time anything else with regard to the terms of the rental?

"A. He said the terms of this agreement were oral between he and Rolland McMaster—

"Mr. Noonan (interposing): Your Honor, I object to that, any statements made by Mr. Wolff concerning Mr. McMaster; purely hearsay as to him.'"

McMaster claims that it was error for the statement of his co-defendant Wolff to have been admitted against him (McMaster) absent a prompt warning by the trial judge to the jury to disregard Wolff's statement completely as far as defendant McMaster was concerned.

Such an admonition was given later in the Judge's charge.

It is defendant McMaster's contention that the admonition to the jury was too long delayed, (see *United States v. Duff*, 332 F.2d 702 (C.A. 6, 1964)) and inadequate when given.

Appellee on the other hand contends that the admonition was adequate and the error in failing to give it coincidentally with the admission of the statement was not prejudicial within the meaning and purpose of Rule 52(a) of the Federal Rules of Criminal Procedure. Appellee also argues, in effect, that defendant's counsel waived any possible objection.

This last contention is given some weight by the fact that defendant's counsel, after objecting to the testimony on grounds of hearsay, did not request a judicial admonition to the jury that it disregard the testimony as to McMaster, and indeed never did make such a request. The admonition contained in the charge (which we deem adequate) was requested by the prosecution. It is also true that Gylph, the FBI agent, was cross-examined extensively by counsel for Wolff as to statements contradictory to the one objected to and that Wolffs' subsequent statements to Glyph (generally to the effect that the Youngstown-Ram "lease" agreement was not made with McMaster) went into the record without objection from McMaster's counsel.

Whatever merit the waiver argument may have, we choose not to base decision thereon. For obviously, McMaster's counsel was presented with a difficult choice as to whether or not to continue to object to hearsay evidence when it was favorable to his client's position.

The evidence quoted was, of course, plainly admissible as to defendant Wolff as a statement against interest. But as to defendant McMaster's objection on grounds of hearsay, we have another matter.

This was not a conspiracy case. Wolff was not an agent of McMaster and the statement (admissible as to Wolff) was not admissible as to McMaster. 4 Wigmore, *Evidence*, §§1076, 1079 (3d ed. 1940).

Further, recently in *United States v. Duff, supra*, we have held that a delay in the giving of an admonition to the jury to disregard evidence can be prejudicial.

Here there was error in delaying the admonition, and our question is whether this error was an invasion of substantial rights of defendant McMaster or harmless error?

The proposition that jury verdicts shall not be reversed because of harmless error is set forth both in statute[4] and in rule.[5] Nonetheless, in American courts (particularly as distinguished from the English) there is a tendency to give the defendant the benefit of any substantial doubt[6] as to whether the error is harmless—and we have sought here to keep that fact in mind.

Defedant cites *Krulewitch v. United States,* 336 U.S. 440 (1949), to us on this point. In *Krulewitch* we find this discussion:

> "It is contended that the statement attributed to the alleged co-conspirator was merely cumulative evidence that without the statement the case against petitioner was so strong that we should hold the error harmless under 28 U.S.C. (1946 ed.) §391. In *Kotteakos v. United States,* 328 U.S. 750, we said that error should not be held harmless under the harmless error statute if upon consideration of the record the court is left in grave doubt as to whether the error had substantial influence in bringing about a verdict. We have such doubt here. The Florida District Court grand jury failed to indict. After indictment in New York petitioner was tried four times with the following results: mistrial; conviction; mistrial; conviction with recommedation for leniency. The revolting type of charges made against this petitioner by the complaining witness makes it difficult to believe that a jury convinced

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[4] "Sec. 2111. *Harmless error.*

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. §2111.

[5] "Rule 52. *Harmless error and plain error.*

"(a) *Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Rule 52 FED. R. CRIM. P.

[6] The actual test language employed is, of course, "grave doubt" and "substantial influence" upon the verdict. *Kotteakos v. United States,* 328 U.S. 750, 765 (1946).

of a strong case against him would have recommended leniency. There was corroborative evidence of the complaining witness on certain phases of the case. But as to all vital phases, those involving the sordid criminal features, the jury was compelled to choose between believing the petitioner or the complaining witness. The record persuades us that the jury's task was difficult at best. We cannot say that the erroneous admission of the hearsay declaration may not have been the weight that tipped the scales against petitioner." *Krulewitch v. United States, supra* at 444-45.

On our review of the entire record in McMaster's case, we find this case at the opposite extreme from *Krulewitch* in the range of criminal appeals claiming error in admission of evidence. Where the court there found "grave doubt" as to guilt, we find (excluding the Wolff statement) that the evidence of McMaster's willful violation of this statute was "overwhelming." *Berger v. United States*, 295 U.S. 78, 89 (1935).

We find this case much closed to the factual situation of *Lutwak v. United States*, 344 U.S. 604 (1953), than to *Krulewitch v. United States, supra.*

No other meritorious appellate issues are presented.

The convictions are affirmed.

## STATUTES INVOLVED

### 29 UNITED STATES CODE

186. Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds.

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . .

# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 165

ROLLAND B. MCMASTER, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 166

WILLIAM F. WOLFF, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals is reported at 343 F. 2d 176.

### JURISDICTION

The judgment of the court of appeals was entered on March 25, 1965. A petition for rehearing was denied on April 21, 1965. The petition for a writ of certiorari in No. 165 was filed on May 20, 1965, and

in No. 166 on May 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

No. 165:

1. Whether, in the circumstances of this case, the court of appeals properly found no prejudicial error in the trial court's failure to caution the jury, at the time evidence of admissions of a co-defendant was introduced, to consider such admissions only against the maker, where such caution was given in the final charge.

No. 166:

2. Whether, after the court had instructed the jury on each of the necessary elements of the offense charged, including payment and delivery of money, the court's reference to the offense of agreement to pay, in the course of reading the statute to the jury, constituted reversible error.

3. Whether, under an indictment charging payments to McMaster, it was a fatal variance to show payments to a corporation of which McMaster was the sole stockholder.

4. Whether the evidence was sufficient to establish the offense charged and the venue.

## STATUTE INVOLVED

For the time period covered by these indictments, 29 U.S.C. 186 provided, in pertinent part:

> (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any repre-

sentative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable * * *

(3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business * * *.

STATEMENT

The indictments, each containing 32 counts, were returned in the District Court for the Eastern District of Michigan. Petitioner McMaster, an official of Local 299 of the Teamsters Union, was charged with violating 29 U.S.C. 186(b) by receiving sums of money from Youngstown Cartage Co., an employer of members of Local 299. The sums were alleged to have been received through Ram Transport, Inc., and to have been made between December, 1956, and July, 1959. Petitioner Wolff, president and principal stockholder of Youngstown, was charged with causing Youngstown to make the payments to McMaster (R. I, 5–34). Each defendant was convicted as charged, sentenced to one and one half year's imprisonment (one-year concurrent sentences were imposed on each defendant on 31 counts and a consecutive sentence of one half year on the remaining count), and fined

$10,000 (R. IV, 2075–2078). The convictions were affirmed on appeal.

The evidence showed that Youngstown checks totalling more than $8,000 were made out to Ram Transport Co. and deposited in the Ram bank account in the Detroit Bank and Trust Company in Detroit, Michigan (R. I, 113–116, 118; R. II, 682–684). Petitioner Wolff admitted preparing 23 of the checks (R. I, 119). In an interview with an F.B.I. agent in June, 1961, Wolff said that the payments were for rental of a truck for use in the Youngstown terminal (R. I, 105) pursuant to an oral agreement between Wolff and McMaster who, Wolff said, was president and owner of Ram (R. I, 106). In September, 1961, Wolff said in another interview that the rate of rental was about $3.00 an hour and that the rental was made on the recommendation of Youngstown's terminal manager (R. I, 107–111). In this interview Wolff also said that he had never been involved in any business dealings with McMaster (R. I, 141) and that he had learned from McMaster that the latter did not own Ram (R. I, 167–168).

Much of the government's evidence was designed to show that Youngstown did not in fact use a truck owned by Ram. The sufficiency of that proof is not disputed.[1]

With respect to McMaster's connection with Ram, the government proved that Ram was originally jointly owned by McMaster and Reed (R. I, 83–85).

[1] The evidence is summarized in the argument of government counsel (R. IV, 1865–1878, 1884–1885).

When Reed later wanted to sell his interest, McMaster gave him $500 and had him sell the stock to one Powers for an additional $2,000, to be paid in monthly installments (R. I, 89–90). Reed later sued Powers for nonpayment. In February, 1956, the suit was settled with McMaster paying Reed the $2,000 and Reed indorsing the stock certificate to McMaster (R. I, 90–91, 538–539). In a tax return filed by Ram in August, 1957, McMaster was listed as owner of 100% of the stock (R. I, 418–419). The government showed that in the years 1957–1960 sums of money much greater than the payments from Youngstown to Ram were either credited to McMaster (R. I, 427–428, 532–536) or withdrawn from the Ram account and deposited in the joint account of McMaster and his wife and used for investments by McMaster (R. III, 1234–1241, 1222–1230, 1278–1279, 1281, 1584–1585).

Petitioner McMaster testified that, at about the time of the settlement with Reed, he was separating from his wife and that, since she could work with Powers, he acquired Ram for her (R. III, 1441–1445). Although they were not divorced until 1961, McMaster testified that in 1956 it was decided informally that she was to keep Ram Transport and he was to keep M & G Trucking (R. III, 1448–1449). His wife kept the books for both corporations (R. III, 1449). McMaster explained that the amounts from Ram deposited in the joint checking account and traced to his personal ventures were loans from his wife; he denied receiving the other sums (R. III, 1473–1478, 1482–1485, 1489–

1506). He also testified that, at the time of the 1956 arrangement, his wife said she would pay for a boat for him and she did so through Ram (R. III, 1535–1537). The insurance on the boat was in the name of Ram (R. III, 1553).

## ARGUMENT

1. When the statements made by Wolff in June and September, 1961 (the first stating that he made the payments pursuant to a lease negotiated with McMaster; the second denying that he had any business dealings with McMaster) were introduced in evidence, the court was not asked to give and did not give any instruction limiting the applicability of this evidence to Wolff. In his motions for judgment of acquittal McMaster's counsel argued that such testimony was not admissible against McMaster (R. III, 1328–1333; R. IV, 1794), although he again did not ask for a limiting instruction. The trial court stated in its instructions to the jury that declarations and admissions of a defendant from which an inference of guilt may be drawn "are admissible against him, and him only, as admissions" (R. IV, 2030). The court of appeals ruled that such a cautionary instruction should normally be given when the statement is introduced, and that delay in the giving of an admonition can be prejudicial. The court of appeals held, however, that in view of the overwhelming evidence of guilt here the error in not giving the instruction earlier could properly be deemed harmless (Pet. No. 165, App. 21–23).

It is this ruling which McMaster (Pet. No. 165) seeks to have this Court review.[2]

The ruling of the court of appeals was correct. The statement by Wolff was not, as McMaster claims, the most damaging and direct evidence against him. The significant evidence, laboriously proved in a long trial, was that Youngstown made payments for a truck which did not exist to a corporation which was an alter ego of petitioner. There was no reason for the payments to be made except as payments to petitioner by virtue of his position. Without Wolff's statements, there was ample evidence to support the conclusion of the jury (which was eventually instructed not to consider Wolff's admissions in McMaster's case), that Youngstown made the payments to Ram as a means of making payments to petitioner, and that McMaster used Ram as a means of receiving such payments.

2. In its instructions, the trial court set forth the elements of the offense charged against each defendant. As to Wolff, these instructions included the direction that the jury must find that Wolff "paid and/or delivered money, and caused Youngstown

[2] The suggestion in McMaster's petition that the case should be returned to the court of appeals for more extensive treatment of other issues raised before the court of appeals is frivolous. The court of appeals dealt with the validity of the indictment and the sufficiency of the evidence, both as to the substantive offense and as to venue. It found the issue discussed in the text to be the "only substantial claim of error" (Pet. No. 165, App. 18). Petitioner does not endeavor to show in what respect the other issues raised were worthy of greater comment.

Cartage to pay and deliver money to defendant McMaster as a representative of any employees of Youngstown Cartage" (R. IV, 2025). However, when it subsequently read the statute to the jury (R. IV, 2026), the court included statutory language making it an offense "to agree to pay or deliver" any money to the representative of employees. Petitioner Wolff argues (Pet. No. 166, pp. 8–11) that this recitation of the statutory language, in light of evidence of letters referring to a verbal agreement for the lease of a truck (see R. I, 140, 164), enabled the jury to convict him of the offense of agreement, which was not charged, rather than of actual payment. This argument is insubstantial. There was never any dispute about the fact that payments were actually made to Ram. The jury had to decide whether these payments were payments to McMaster and whether they were for a proper purpose under the statute, *i.e.*, for the lease of equipment. There was thus no possibility that the mere reading of the statute, in the light of the prior specific enumeration of the elements of the offense charged against Wolff, would lead the jury to convict of an offense not charged.

3. Wolff's challenge to the sufficiency of the indictment on the ground that it charged payment to McMaster, without specifying that the payments were to McMaster through Ram (Pet. No. 165, pp. 12–16) is without merit. It was proper to charge payment to McMaster since such payment was an element of the offense. In light of the evidence in this case, Wolff could have been in no doubt regarding what payments were thus referred to in the indictment.

4. The attack upon the sufficiency of the evidence (Pet. No. 166, pp. 16–17) is answered by the opinion of the court of appeals. The finding that Wolff knew that the payments were being made to McMaster did not rest solely on his admissions, but upon the totality of the evidence. Moreover, Wolff's admission that he dealt with McMaster in making the "lease" that was the alleged basis of the payments was specifically corroborated by evidence showing McMaster to be the sole stockholder of Ram. As for venue, it was not disputed that the money represented by Youngstown's checks was paid into Ram's bank account in Detroit. Thus the money was "delivered" in the Eastern District of Michigan where the trial was held.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1965.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 166

WILLIAM F. WOLFF, SR.,
Petitioner,
v.
UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR REHEARING

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR REHEARING

Pursuant to Rule 58 of the Revised Rules of the Supreme Court of the United States, petitioner in the above captioned cause respectfully requests the Court to reconsider its Order of November 11, 1965, denying the Petition for Writ of Certiorari and to grant a rehearing on the

question as stated hereinafter, which question had previously been raised in separate parts by petitioner in his previous Petition for Certiorari but for clarity is repeated.

**WAS PETITIONER DENIED DUE PROCESS OF LAW BY THE JURY CONSIDERING HIS EXTRA-JUDICIAL STATEMENT ADMITTING AN ALLEGEDLY ILLEGAL PAYMENT TO HIS CO-DEFENDANT BUT CLAIMING A STATUTORY EXEMPTION, AT A JOINT TRIAL WHEN THE CO-DEFENDANT RECIPIENT, DENIED ANY AGREEMENT OR PAYMENT?**

The Statute[1] concerning an illegal pay-off between a management official and a union official makes it quite clear that there must be two persons involved in order to commit a crime. There is no crime unless petitioner Wolff paid money to a prohibited individual.

The Trial Court at a very early stage of the trial characterized the crime as being a "joint enterprise in crime" (443a). The Statute also makes it a crime to *agree* to

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[1] Sec. 186—Restrictions on payments to employee representatives; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

"(a) It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable . . . (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business . . ." 29 U.S.C. Sec. 186. (The statute as noted above was applicable during the period covered by these indictments. It has since been amended. See Title 29 U.S.C.A. Sec. 186, 1964 Cumulative Annual Pocket Part.)

make any payments as therein described. The indictment was a joint one against both defendants.[2] The government's case consisted of a prepondarum of testimony and witnesses who were questioned concerning an alleged agreement existing between the co-defendants.[3] The extra-judicial statement of petitioner Wolff, as introduced by FBI Agent Gylfe, referred in two of the three conferences to an agreement for rental of a tractor between the co-defendants.[4] The Court's instruction emphasized and allowed the jury to find the defendants guilty of agreeing to pay and receive an illegal payment,[5] as well as the crime charged in the indictment.

But most important, the petitioner, Wolff, in his statement to Agent Gylfe raised the defense of an exemption to the criminal statute. In effect, he said he paid money to his co-defendant but that the said co-defendant had provided valuable consideration therefor, to-wit: a tractor at prevailing market rates. The co-defendant, McMaster, denied any such agreement and denied completely any dealing with the petitioner.[6] The jury was, therefore, asked to determine the guilt or innocence of each defendant after having heard a great amount of testimony implicating both defendants in the crime together; after having heard an extra-judicial confession implicating both defendants

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[2] The Sixth Circuit in its decision, in response to Petitioner's question as to vagueness of the indictment as to him, replied that the portion of the indictment relating to McMaster could be used to cure this defect of knowledge. 343 F2d 176, 181.

[3] Of 57 witnesses called by the government, 45 of them testified in refutation of the agreement between Petitioner and the co-defendant.

[4] 105a-112a.

[5] 2025a-2027a.

[6] 1420a-1421a.

together; after having received instructions from the Court that they could find the defendants guilty of agreeing to make and receive such an illegal pay-off; and after hearing the Court characterize the crime as a joint one. The task of giving each individual defendant fair deliberation and consideration as to him alone, became impossible. The collective mind of the jury could not be departmentalized into separate categories so that it could evaluate and deliberate on petitioner Wolff's defense of having made the payment to a prohibited individual but having received valuable consideration therefor without being influenced by the co-defendant McMaster's testimony completely denying the arrangement or his participation in any such transaction or dealing. Even though the Court gave instruction on this point, it is a derogation of petitioner Wolff's constitutional rights to be tried in this manner.[7]

The jury could not have removed the testimony of defendant McMaster from their collective mind in determining the burden of proof of the government as to petitioner Wolff. Is it not possible that any question the jury had as to whether or not the government had sustained its burden of proof as to petitioner Wolff, was resolved by resort to the contradictory testimony of co-defendant McMaster? Conversely, was any uncertainty of the sufficiency of other evidence to prove guilt beyond a reasonable doubt as to co-defendant McMaster, removed by the fact that the

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[7] The testimony of co-defendant McMaster thus pointedly advised the jury of Petitioner Wolff not having taken the witness stand. Thus impliedly admitting the contradictions as urged by co-defendant's testimony. See *DeLuna v. U.S.*, 308 F2d 140 (5th Cir. 1962), *Hayes v. U.S.*, 329 F2d 209 (8th Cir. 1964). As to whether or not such an instruction can cure this prejudice, see *infra*. "If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the Trial Judge's duty is to order that the defendant be tried separately". (p. 141).

jury resorted to the evidence of the incriminating extra-judicial statement of petitioner Wolff? When the jury returned its verdict of "guilty" as to both defendants, there was no way of determining whether the jury had in fact convicted each defendant because of the government having established its burden of proving its case beyond a reasonable doubt as against each of them or because any weakness of the government's case was laid to rest by the jury considering the contradictory positions of each defendant.

*Jackson v. Denno*, 378 U.S. 368, 12 L.ed. 2d, 908 (1964) was a determination by this Court that it was constitutionally impermissible for the same trial jury to resolve both the issue of the guilt or innocence of a defendant as well as the issue of voluntariness of a confession. The majority opinion found that a jury could not have divided its collective mind so as to be able to consider each of these issues apart from each other:

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?
>
> It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its findings of voluntariness, if this is the course it took, was effected by the other evidence showing the confession was true." (388-389, U.S., 922 L.ed. 2d.)

The logic and reasoning of rules as to confession must apply to any incriminating extra-judicial statement made

by a defendant.[8] This Court in *Jackson, supra,* determined that a jury should not be permitted to be influenced by evidence against a defendant that as a matter of law they can not consider but as a matter of fact they can not disregard. The jury in this case could not consider petitioner Wolff's statement incriminating his co-defendant in determining the co-defendant's guilt or innocence, as a matter of law, but as a matter of fact they could not possibly have disregarded the contradictory nature of the statement in considering co-defendant's guilt or innocence. The jury in this case could not have determined the defense of petitioner Wolff that he had received valuable consideration from the co-defendant without considering at the same time, the co-defendant's testimony completely refuting and contradicting this defense.

The jury in the case at bar must, because of the previous factors mentioned, be considered as having rendered a joint verdict, resulting from joint deliberation and joint consideration for both defendants. It, therefore, behooves petitioner Wolff to avail himself of the grave prejudice and errors of law resulting in his co-defendant not receiving a fair trial. The co-defendant can not determine that the jury after listening to the extra-judicial statement of petitioner Wolff effectively ignored the inevitable conclusion that he must have received the money as Wolff stated he gave the money. If the jury is told that A (Wolff) committed certain criminal acts with B (McMaster), then the inevitable conclusion must be that B committed those criminal acts with A. The instruction by the Court to disregard the extra-judicial statement of petitioner Wolff, which incriminated the co-defendant could not have cured

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[8] *Wilson v. U.S.*, 162 U.S. 613 (1896).

the encroachment on the right of the co-defendant to have the jury disregard inadmissible hearsay evidence of any kind.[9]

In *Pointer v. Texas*, 380 U.S. 400, this Court determined that the Sixth Amendment's right "to be confronted with the witnesses against him", including the right to cross-examine these witnesses, was applicable to the states through the Fourteenth Amendment. This Court noted therein that any statements to the contrary as contained in *Stein v. N. Y.*, 346 U.S. 156, 195-196, could no longer be regarded as law. In *Stein*, this Court found that the right of confrontation was not binding on the states and affirmed the conviction of a defendant who had been implicated by the confession of his co-defendants. The confessions had been admitted with the instruction that they were to be considered only against their respective declarants. There is thus cast some constitutional doubt as to whether or not an encroachment upon defendant McMaster's right to confront witnesses and to cross-examine

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[9] Previous jurists have criticized this unfairness to a defendant. "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know this to be unmitigated fiction." Mr. Justice Jackson concurring with Mr. Justice Frankfurter and Mr. Justice Murphy in *Krulewitch v. U.S.*, 336 U.S. 440, 453 (1949).

"Undoubtedly the ability to introduce them (declaration of a co-defendant) adds to the inducement to sweep all those concerned into one indictment; and possibly it would have been better, had the price of the admissibility of separate declarations, made after the event been a separate trial of the declarant; for it is indeed very hard to believe that a jury will, or for that matter can, in practice observe the admonition."

Judge Learned Hand, *U.S. v. Delli Paoli*, 229 F2d 319, 321 (1956). Judge Hand also criticized this "mental gymnastics" in *Nash v. U.S.*, 54 F2d 1006, 1007.

them can be justified by having an instruction advise the jury to disregard such evidence.[10]

The crime charged against petitioner Wolff was one of "knowingly" having paid money to an official of a union representing his employees. The only testimony as to what knowledge petitioner Wolff had as to whom the money was going was his statements to Agent Gylfe. Additionally, petitioner Wolff did not deny having made the payments to Ram Transport, Inc. This latter fact coupled with his acknowledgment that Ram Transport, Inc. was owned and operated by co-defendant, McMaster, was a complete recitation and acknowledgment of all facts necessary to find petitioner Wolff, guilty. Of course, he did attempt, through his statement to Agent Gylfe, to place his payments within an exemption under the Statute.[11] But if he does not have an exemption, then he has in essence confessed the crime with which he was charged. No hearing had been had to determine voluntariness of petitioner Wolff's

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[10] *Delli Paoli v. U.S.*, 352 U.S. 232 (1957) affirming 229 F2d 319, stated that extra-judicial statements even though incriminating a co-defendant are admissible with proper instruction. But see, 78 Harv. L. Rev. 211, 213, "Because of these close parallels between *Jackson* and *Delli Paoli*, *Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process".

Additionally, "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition, therefore, becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." Mr. Justice Frankfurter, in *Delli Paoli v. U. S.*, *supra*, dissenting opinion, with whom Mr. Justice Black, Mr. Justice Brennan and Mr. Justice Douglas join.

[11] Interestingly, an instruction was first suggested, to limit petitioner's statement to him, by the government counsel (1843a-1853a).

confession of fact to Agent Gylfe.[12] The Fourth Circuit Court of Appeals in *U. S. v. Inman*, decided November 18, 1965 34 LW 2291, determined that on any proffer of a confession, the Court should make a determination of its voluntariness, by having a full hearing and allowing all testimony on this issue, and that this should be done even though no objection had been made by defendant. Then the Court, if it resolves the issue of voluntariness favorable to the government, beyond a reasonable doubt, should make a note of its finding in the record and not disclose it to the jury. The jury should then be given the confession and instructed, whether requested or not, that they must be convinced beyond a reasonable doubt that the confession was given voluntarily.[13]

Petitioner Wolff urges that this Court reconsider and grant his Petition for Re-Hearing as herein prayed so that this Court can determine the rights of defendants in joint trials, where an extra-judicial statement of one defendant incriminates the other and the declarant does not take the witness stand. This issue has been brought to the attention of and decided by a number of State Su-

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[12] The only determination on the question of voluntariness made by the Trial court was in his instruction to the jury in regard to limiting petitioner's statement to him (2030a). "Statements and declarations made by a defendant from which, with other circumstances, an inference of guilt may be drawn, are admissible against him, and him only, as admissions, provided it appears that the said statements were voluntarily made by a defendant".

[13] See also *Hutcherson v. U.S.*, 351 F2d 748 (1965).

preme Courts[14] and by Judge Frank in *U. S. v. Delli Paoli*, 229 F. 2d, 319, 324, dissenting opinion. All of these jurisdictions have resolved this issue by insisting on effective deletion of any incriminating statements or identification of the non-declarant co-defendant or a severance of the defendants; and if these conditions can not be done then the extra-judicial statement should not be allowed into evidence.

There are thus alternate procedures available for a proper disposition of this problem by the trial court.

In the case at bar, the trial court could therefore have merely deleted the mention of the co-defendant's name from the extra-judicial statement of the petitioner and even if this deletion were not sufficient to remove any unfair prejudice to the co-defendant, both defendants would have had no possible prejudice engendered to either of them if the trial court had ordered a severance after being apprised of the contradictory nature of the evidence and defenses.

For the foregoing reasons, petitioner requests the Court to vacate its earlier order denying certiorari and grant certiorari to petitioner on the question herein presented.

Respectfully submitted,

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[14] *Peo. v. Aranda and Martinez*, 34 LW 2261, decided November 12, 1965, California Supreme Court, opinion by Traynor, C. J.

*State v. Castelli*, 92 Conn. 58, 101 A. 476.

*Peo. v. Barbaro*, 395 Ill. 264, 69 N.E. 2d 692.

*Peo v. Bolton*, 339 Ill. 225, 171 N.E. 152.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

No. 165

ROLLAND B. MCMASTER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR REHEARING

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

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No. 165

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ROLLAND B. MCMASTER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR REHEARING

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Petitioner, Rolland B. McMaster, respectfully prays that, pursuant to paragraph 2 of Rule 58 of the Revised Rules of this Court, a rehearing be granted of the order of this Court, entered in this case on October 11, 1965, denying the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The reasons for this Petition for Rehearing, hereinafter stated, are confined to substantial and controlling intervening circumstances and grounds not previously presented.

## QUESTIONS PRESENTED

1. Should the trial court, in a joint criminal trial, have either excluded from evidence extrajudicial admissions of a co-defendant which, by their nature, necessarily inculpated Petitioner, or, in the alternative, have ordered a separate trial for Petitioner?

2. Was Petitioner deprived of his constitutional right of cross-examination and confrontation when admissions inculpating Petitioner, made by a co-defendant who refused to testify, were admitted in evidence?

3. Was Petitioner deprived of his right to a fair trial when the trial court ordered his counsel not to make reference in any way to his co-defendant's failure to testify after admissions inculpating him, made by a co-defendant who refused to testify, were admitted in evidence?

## STATEMENT OF THE CASE

Petitioner was convicted of violations of 29 U.S.C. 186(b) for allegedly receiving payments from his jointly tried and convicted co-defendant, Wolff (Pet. 166, Oct. Term, 1965), the president of an employer of employees represented by Petitioner, a labor union official. The payments were actually made by the employer company to a corporation, Ram Transport, Inc., which the government claimed was in effect Petitioner's alter ego. Petitioner contended, in defense, that by the time the payments were made, he had gifted all his interest in Ram to his then estranged wife—from whom he was later divorced. He disclaimed all knowledge of the payments or the transaction.

Wolff, although declining to take the stand, claimed as a defense that bona fide payments were made to Ram for the rental of a truck (an exception to the proscription of Sec. 186 set forth in 29 U.S.C. 186(c)(3)).

There was evidence that funds of Ram, during the period in question, to some degree were made available to Petitioner, as noted by the Court of Appeals (Pet. 15-16), although his wife had sole authority to draw checks (*Ibid.*, 14).

In 1961, shortly before the indictment, Petitioner's co-defendant Wolff made three statements to F.B.I. Agent Gylfe. In the first statement, he claimed that he and McMaster had an oral contract for him to make payments to Ram for rental of a truck. (App. 104a, 106a). Gylfe stated that Wolff said: "*The terms of this agreement were oral between he and Rolland McMaster . . . president and owner of Ram Transport Company,* (App. 105a, 106a)." In the latter two statements to Gylfe, he repudiated his original claim that he dealt with Petitioner (App. 106a, 111a, 141a), claiming instead that he made the agreement with a Ram official.

These statements were admitted over Petitioner's objection (App. 105a-106a) and the court did not limit this testimony to Wolff until he gave his final charge to the jury (Pet. 20).

The government produced evidence contending that no truck existed as claimed by Wolff. Wolff did not take the stand to refute either the F.B.I. agent's testimony or the nonexistence of the truck.

Prior to final argument, the court ordered that in closing argument no reference be made "that would

in any way indicate the failure of Wolff to take the stand" (App. 1815a-16a, 1845a-46a), and, in his charge, effectively instructed the jury that Wolff conceded making the payments to Petitioner, but that he relied on the exemption created under Sec. 186(c)(3) (App. 2027a). The Sixth Circuit held that the trial court erred in not giving, until its final charge, an instruction to the jury limiting the effect of Wolff's inculpatory admission to Wolff only. It, however, held that in its opinion the error was harmless as it claimed McMaster's guilt had been clearly proved by other evidence (Pet. 20-23).

## REASONS FOR GRANTING THE PETITION FOR REHEARING

1. The statement attributed to Wolff was devastating to McMaster as it completely destroyed his defense of lack of connection with Ram and the payments charged in the indictment. Admission of such a statement by a co-defendant implicating, and as evidence against, Petitioner cannot realistically be consigned as harmless error without totally denying Petitioner the right of fair trial by a jury. This court in *Fahy* v. *Connecticut*, 375 U.S. 85, 84 S. Ct. 229 (1963), established the rule that admission of evidence unconstitutionally obtained could never be regarded as harmless error *so long as it may have contributed to the conviction.* The same rationale is true in the instant case unless it could be said that Wolff's extrajudicial statement could not have contributed at all to McMaster's conviction. The rule in *Fahy* should apply equally to federal trials as to state court proceedings.

The rights of defendants in joint trials to be reasonably protected against evidence of admissions of co-

defendants which implicate them has come under increasing scrutiny since this Court decided (5-4) *Delli Paoli* v. *United States,* 352 U.S. 232, 77 S. Ct. 294 (1957). *Intervening since denial of certiorari here,* Chief Justice Traynor (*People* v. *Aranda and Martinez,* 34 LW 2261, Sup. Ct. Cal., Nov. 12, 1965) has enunciated a rule for California requiring either the effective deletion of all reference to the co-defendant from the confession (admission), or the grant of a separate trial for the aggrieved, or, if the state persists in joint trial notwithstanding that the reference to the "non admitting" defendant cannot be effectively exorcised from the statement, the exclusion of the entire statement. Justice Traynor's reasoning is compelling here. If A confesses that he committed criminal acts with B, the jury cannot effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.

*Aranda*[1] and this Court's decision in *Jackson* v. *Denno,* 378 U.S. 368, 84 S. Ct. 1774 (1964), have raised great speculation that the vitality of *Delli Paoli, supra,* may be sapped.[2] For almost without alteration, the below-quoted language of *Jackson, supra,* (forbidding the submission to a trial jury of the issue of voluntariness of a confession) is equally applicable to an attack on the philosophy of *Delli Paoli:*

> "If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the con-

[1] The Time Magazine article, December 24, 1965, page 31, is reproduced in its entirety as Appendix A hereto.

[2] 78 Harv. L. Rev. 211, 213: "because of the close parallels between *Jackson* and *Delli Paoli, Jackson* may foreshadow a holding that the *Delli Paoli* procedure violates due process."

fession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?

"It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its findings of voluntariness, if this is the course it took, was affected by the other evidence showing the confession was true." 378 U.S., at 388, 84 S. Ct. at 1787.

*Delli Paoli's* philosophic approach had been denounced as sheer sophistry by numerous jurists[3] and a number of states have long adhered to the rule recently adopted by California with signal success.[4]

In the instant case, Petitioner was the more seriously imposed upon, since the statement of Wolff was not merely that he had commited a criminal act with McMaster, but that he had committed an act with McMaster which would only be a crime if committed with McMaster, *a fortiori* if Wolff made an oral contract with McMaster, owner of Ram Transport, Inc., then Petitioner, owner of Ram Transport, Inc., perforce made an oral contract with Wolff.

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[3] *Krulewitch* v. *United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949): "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . [is known by] all practicing lawyers to be unmitigated fiction," Jackson, J., concurring with Murphy, Frankfurter, JJ.; *Nash* v. *United States*, 54 F. 2d 1006, 1007, "mental gymnastics," Learned Hand, J.; *U.S.* v. *Delli Paoli*, 229 F. 2d 319, 321 (Hand, J.), 324 (Frank, J., dissenting).

[4] *State* v. *Castelli*, 92 Conn. 58, 101 A. 476; *Peo.* v. *Barbaro*, 395 Ill. 264, 69 N.E. 2d 692; *Peo.* v. *Bolton*, 339 Ill. 225, 171 N.E. 152; *State* v. *Rosen*, 151 Ohio St. 339, 86 N.E. 2d 24.

In short, the compartmentalization required by *Delli Paoli* is virtually impossible. And in numerous other respects *Delli Paoli* is inapposite here, and to the extent that case is still vital, it should be limited so as not to be applicable in situations as this.

In *Delli Paoli,* a closely divided court affirmed a conviction where a statement of one co-defendant was admitted. The majority was of the opinion that under the circumstance of that case the defendant against whom the declaration was admitted, was adequately protected by the court's instructions. The court held that the only issue in that particular case was the adequacy of the instructions. (The dissenting Justices, however, felt that a jury could not be expected to follow instructions of this sort, and that permitting such damaging testimony to be heard by the jury was prejudicial error. In the light of this dissent, it is difficult to perceive how a court can rule, as did the Sixth Circuit here, that an extrajudicial confession by a co-defendant, to the effect that payments for a non-existent piece of equipment were arranged with the owner of a company, could be considered harmless error).

However, in the instant case, it is clear that the factors that impelled the Supreme Court to affirm are clearly lacking. First of all, in *Delli Paoli,* when the declarations were admitted, the Court instructed the jury at great length as to the effect of the declarations. 352 U.S., at pp. 239-240. The substance of this instruction was repeated several times during the trial, *ibid.* Also, a thorough instruction on the subject was included in the court's charge. 352 U.S., at p. 240, fn. 6. On the other hand, in the instant case, no in-

struction whatever was given at the time the evidence was admitted *and in fact it was admitted against both defendants without restriction* (App. 105a-106a, 1815a). The trial court expressed the opinion that, because a joint enterprise in crime is charged, the hearsay rule does not apply (App. 443a). *No limiting instruction was given during the trial.* The court prior to charging the jury stated he would not give such an instruction in his charge even though the government suggested that such an instruction might be in order (App. 1815a-1816a). Because of the court's rulings the government strenuously relied upon the statement attributed to Wolff in its closing argument with respect to McMaster (App. 1888a, 1993a, 1999a, 2001a). Although the court informed counsel he would not instruct on the issue, nevertheless he gave a vaguely worded and confusing instruction:

> "Statements and declarations made by a defendant from which, with other circumstances, an inference of guilt may be drawn, are admissible against him, and him only, as admissions, provided it appears that the said statements were voluntarily made by a defendant." (App. 2030a).

This instruction, objected to by McMaster (App. 2038a), made no reference to the specific evidence involved, i.e., no reference was made to the testimony of the F.B.I. agent. *At no time was the jury instructed that the statement of the agent was inadmissible against McMaster.*

The feckless charge of the court, falling far short of the requirements of *Delli Paoli,* certainly did not carefully compartmentalize the case for the jury, cf. *Schaffer* v. *U. S.,* 362 U.S. 511, 80 S. Ct. 945 (1960); *McElroy* v. *U. S.,* 164 U.S. 76, 17 S. Ct. 31 (1896);

*Kotteakos* v. *U. S.*, 328 U.S. 750, 66 S. Ct. 1239 (1946). Indeed, the charge to the jury highlighting Wolff's defense (as being grounded in an admission that the payments were indeed made to Petitioner) underscored the prejudice.

This case thus affords this Court a forum to reexamine the current vitality of the highly controversial *Delli Paoli* case. It likewise, should the Court find *Delli Paoli* still vital, affords the Court a forum to delimit and circumscribe the outer limits of that doctrine. It is plainly an area in which an enunciation by the Court should be shortly forthcoming.

2. Recently this Court in *Pointer* v. *Texas,* 380 U.S. 400, 85 S. Ct. 1065 (1965), had occasion to find inviolate a state court defendant's right to confrontation and cross-examination. The Court noted specifically that *Stein* v. *New York,* 346 U.S. 156, 195-196, 73 S. Ct. 1077, 1098-1099 (1953), to the extent that it was in conflict could no longer be regarded as law. In *Stein,* the Court affirmed conviction of a co-defendant implicated by the confession of his co-defendants holding that the right of confrontation was not incorporated in the Fourteenth Amendment.

In the light of *Pointer, supra,* the issue of whether an inculpating statement of a co-defendant who declines to take the stand violates the right of the inculpated defendant to confrontation and cross-examination is raised. This issue is sharpened in the instant case by the adherence of the maker of the statement to a defense grounded on the truth of the statement; and by the trial court's refusal to permit Petitioner's counsel to comment on the maker's failure to testify, and draw reasonable inferences therefrom. Petitioner

was thus effectively prevented from challenging the very evidence which the court admitted into evidence against him.

3. Closely allied to the foregoing contention (and mentioned therein) is the denial of the right to Petitioner's counsel to comment and draw reasonable favorable inferences in closing argument from Wolff's failure to testify.

*DeLuna* v. *United States,* 308 F. 2d 140, 145 (5th Cir., 1962); *Hayes* v. *United States,* 329 F. 2d 209, 221-222 (8th Cir., 1964). If the trial court ruled correctly in each of these instances, we are faced with a situation which we submit is entirely contrary to fundamental principles of Anglo-American jurisprudence; i.e., McMaster and his counsel were prevented from in any way challenging the damning statements attributed to Wolff, the court would not relieve the situation by an instruction, and the jury was instructed that Wolff paid the money to McMaster, although McMaster's defense is that he received no money from Wolff. The court for all practical purposes thereby directed a verdict of guilty against McMaster.

Of course, had the questions, instructions and comments desired by Petitioner been permitted, defendant Wolff might have been equally justified in complaining. Had Petitioner's instructions and comments relating to the inability to cross-examine Wolff been permitted, Wolff's right against self-incrimination could have been infringed upon. *DeLuna* v. *United States, supra; Hayes* v. *United States, loc. cit., supra.* Furthermore, had the trial court failed to instruct that Wolff was availing himself of the exemption, this clearly would have been prejudicial to Wolff.

Faced with this dilemma, the court in *DeLuna* held that each defendant retained all his inherent constitutional rights regardless of joint trial—and that if the rights of one infringed on those of the other then for each to see the face of justice each defendant must see it separately.

The *DeLuna* doctrine has been much quoted and speculated upon. Since it involves basic constitutional rights which are incorporated in the Fourteenth Amendment, it is a doctrine of a constantly recurring nature in joint trials in both state and federal courts. An evaluation of the doctrine and its applicability is long overdue. By speaking on this issue a gray area in the administration of justice will be settled by the Court.

## CONCLUSION

For all the foregoing reasons the Petition for Rehearing should be granted and a writ of certiorari allowed.

Respectfully submitted,

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**Certificate of Counsel**

Pursuant to the requirements of Rule 58(2) of the Revised Rules of the United States Supreme Court, we, the undersigned, counsel for Petitioner, Rolland B. McMaster, certify that this petition for rehearing is presented to this Court in good faith and not for purposes of delay and is restricted to those grounds specified in said rule.

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## APPENDIX A

**Article Time Magazine, Dec. 24, 1965 Issue, p. 31**

# CRIMINAL JUSTICE

## Another Confession Problem: Unjoining the Joint Trial

As if the continuing U.S. confession controversy were not complicated enough, now the custom of joint trials has surfaced to compound the confusion. When a crime involves more than one defendant, most prosecutors aim to try them together; indeed, joint trials have occurred in many of the most famous U.S. criminal cases. But what if one defendant's confession implicates another? Is the use of such evidence [illegible] unfair to a man who has not confessed that it must be excluded?

The question arises because of a jewelry-store holdup in Los Angeles, after which the police arrested Henry Martinez and his alleged accomplice, John Aranda. At their joint trial, a policeman testified that Martinez had confessed, implicating Aranda. The judge followed a common practice: he ruled Martinez's confession admissible, but warned the jury not to consider it as evidence against Aranda. Not surprisingly, however, the jury found both men guilty of first-degree robbery.

Acting under its broad new confession doctrine (*People* v. *Dorado*), the California Supreme Court has voided Martinez's confession on the ground that the police failed to warn him of his rights to silence and to counsel as soon as they had other solid evidence against him—his fingerprints at the scene of the crime. In effect, that reversal also destroyed the case against Aranda—and spurred the court to confront the whole problem of how confessions should be handled in joint trials.

Brainwiping. In 1957 the U.S. Supreme Court ruled by a vote of 5 to 4 that federal juries could be trusted to

follow judges' instructions and compartmentalize the evidence against co-defendants, because otherwise "the jury system does not make sense." But in that decision (*Delli Paoli* v. *U.S.*), the four dissenters argued, in the words of Justice Felix Frankfurter, that whatever is said in joint trials "cannot be wiped from the brains of the jurors." And this year the court seemed to lean toward the Frankfurter attitude as it struck down a similar kind of mental gymnastics: the old custom of asking the same jury to determine both the validity of a confession and the confessor's guilt or innocence. Even if the confession proves to have been coerced, how can a jury ignore what it says? In *Jackson* v. *Denno*, the court ruled that the judge must determine a confession's voluntariness before the jury may hear it (TIME, Jan. 22).

Speaking for the California court in the Martinez-Aranda case, Chief Justice Roger Traynor took his cue from *Jackson* and reversed Aranda's conviction on the ground that a jury cannot "segregate evidence into separate intellectual boxes." In short, said Traynor, if A confesses that he committed criminal acts with B, the jury cannot "effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." From now on, ruled Traynor, California courts must handle codefendant confessions according to new procedures:

Confessions are permissible in joint trials if all incriminating references to other defendants are "effectively deleted" from the confession in question. In Aranda's case, it would have sufficed merely to delete his name from Martinez's confession because the confession contained no other clue to his identity.

When one defendant's confession so completely involves another defendant that "effective" deletion is impossible, the judge may grant a defense motion for separate trials.